United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Corrected

74-2027 6

B
P/S.

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

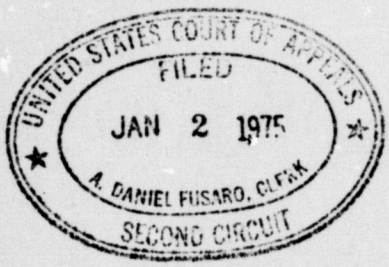
Plaintiff-Appellee,

—against—

MILTON COHEN, BERNARD DEUTSCH and STANLEY DUBOFF,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT DEUTSCH



SEGAL & HUNDLEY
Attorneys for Defendant-Appellant
Bernard Deutsch
745 Fifth Avenue
New York, New York 10022
Tel.: 753-7800

TABLE OF CONTENTS

PAGE

CITATIONS

Table of Cases:

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

MILTON COHEN, BERNARD DEUTSCH and STANLEY DUBOFF,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT DEUTSCH

Preliminary Statement

Bernard Deutsch appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 7, 1974, after a six and one-half week trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 73 Cr. 1085, filed in November, 1973, contained sixteen counts.* On April 23, 1974, at the suggestion of Judge Ward, who sought to make the charges more manageable by reducing the number of triable counts, defendants agreed to a superseding Information. This Information, containing four counts, was identical, almost verbatim, without substantive charges, to the prior Indictment.

Count One charged a conspiracy between Bernard Deutsch, Stanley DuBoff, Milton Cohen, Daniel Dreisman,** and unindicted co-conspirators, Bernard Shwidock,

* A bill of particulars was filed under this Indictment on March 27, 1974, and an amended bill of particulars on April 12, 1974.

** Dreisman's case was severed by the Government on April 23, 1974.

Stuart Schiffman, Kelly, Andrews, Bradley & Co., V.F. Naddeo Co., Inc., Fred Mazzeo, Allessandrini & Co., Inc., Raymond Weiss, New Dimension Securities Corp., Stanley Ryback, Somer Jack Rothman, Jack Reiss, Hugh Deane and John Hurley, to commit stock fraud, securities manipulation and mail fraud, in violation of Title 15, U.S.C. Sections 77q, 77j, 77x, Rule 256(e) (17 C.F.R., § 230, 256), 78j(b) and 78(ff), and Title 18 United States Code, Sections 1341 and 2. Counts Two, Three and Four charged Deutsch, DuBoff and Cohen with the substantive crimes of stock fraud, securities manipulation and mail fraud in violation of the above named statutes.

Trial commenced on April 23, 1974. On June 7, 1974, each defendant was found guilty on all four counts.

On July 12, 1974, Judge Ward sentenced appellant Deutsch to 3 years imprisonment on each count, such terms to run concurrently. On July 16th, Stanley DuBoff was sentenced to 3 years imprisonment on each count, such terms to run concurrently; and Milton Cohen received 6 months imprisonment on each count, such terms to run concurrently.

A Notice of Appeal was duly filed on July 19, 1974 on behalf of Bernard Deutsch.

Statement of Facts

A. *Introduction*

In 1968, Richard Packing Company ("Packing"), whose business prior to 1968 consisted of the processing and sale of meat and meat products at wholesale, decided to expand its operations to include the franchising of drive-in and walk-in restaurants.* A franchise marketing organi-

* Packing was organized as a Minnesota corporation on July 19, 1967, as a successor to a partnership organized in January, 1967, by Milton J. Cohen and Harvey D. Cohen. In August, 1967, Packing effected an underwritten public offering of 100,000 of its common shares at an initial offering price of $2.25 per share. Milton and Harvey Cohen owned 375,000 shares of restricted stock, which was reserved to Packing's management.

zation, Status Marketing, was retained to develop a marketing concept and assist in the sale of "Circus Wagon" franchises.

Bernard Deutsch ("Deutsch") and Stanley DuBoff, ("DuBoff"), as registered representatives at Jaffee & Co., a New York broker-dealer registered with the Securities and Exchange Commission, took an active interest in Packing and Packing stock. Their interest was well known, as was the fact that Deutsch, on behalf of Jaffee & Co., was providing advisory investment assistance to Packing and introducing the company to people who could develop ideas for the new franchising venture.

Between July, 1968 and March, 1969, approximately 100,000 shares of Packing common stock were traded on the over-the-counter market. The defendants were not charged in the Indictment with any violation relating to the initial offering of 100,000 shares. Approximately 14,000 of these shares were traded by Kelly, Andrews & Bradley, Inc. ("KAB"), an over-the-counter broker-dealer registered with the Securities and Exchange Commission, of which Bernard Shwidock, an unindicted co-conspirator, was a principal.

To help finance the new franchise venture, Packing issued a secondary offering of an additional 10,000 shares of its common stock, in March, 1969, for an amount to be determined by the market, and not to exceed $300,000. KAB acted as billing agent in connection with this public offering.

Among those who purchased shares from the new issue were Harry Morginstin, Deutsch's brother-in-law, and William Harris, DuBoff's father-in-law, who respectively gave Deutsch and DuBoff complete discretion over their stock investments and for whom Deutsch and DuBoff opened brokerage accounts at KAB. KAB also purchased a number of these shares for its own trading account.

Jaffee & Co. also received orders for the new issue shares, as well as for other shares of the Packing stock. Because Jaffee & Co. was a non-clearing member of the New York Stock Exchange and did not engage in a direct over-the-counter market, except on rare occasions, Jaffee fulfilled the orders it received through various over-the-counter trading houses, including KAB, Naddeo, Allessandrini, and New Dimension Securities.* Further, by avoiding any disclosure of Jaffee's interest in particular stocks, including Packing, it was possible to prevent any artificial rises in the prices of the stocks in which they invested. Deutsch and DuBoff, because of their continuing interest in Packing stock, were often able to inform those trading houses of where the stock they ordered could be acquired.

The Financial Venture Fund ("FVF") in Denver, Colorado, was one of Jaffee's customers. Deutsch had brought Packing, among other companies, to the attention of Jack Hurley** ("Hurley"), FVF's portfolio manager sometime in late 1968 or early 1969. In February or March, 1969, Deutsch told Hurley about Packing's public offering, advised Hurley that his Fund would do well with the stock, and FVF began buying. Subsequently, and apparently because of the performance of Hurley's fund purchases, Financial Dynamics Fund and Financial Industrial

---

* Bernard Shwidock, a principal of KAB; Fred Mazzeo, a principal of Naddeo; and Raymond Weiss, a principal of Allessandrini, were all named as unindicted co-conspirators. Stanley Ryback, also an unindicted co-conspirator, set up New Dimension Securities with the assistance of Deutsch and DuBoff, who hoped eventually to become involved in the ownership of that firm.

** Hurley was also named an unindicted co-conspirator. As a portfolio manager of FVF, Hurley was one of five different managers of the parent organization, Financial Programs. The three Funds in Financial Programs that purchased Packing stock were FVF, Financial Dynamics Fund ("FDF"), and Financial Industrial Fund ("FIF"). FVF's stated investment objective was the acquisition of highly volatile, "start-up" companies whose potential growth was great, but which represented a high risk investment.

Fund, the two other Denver Funds, also began to buy. As of April, 1970, the three funds controlled 75% of the float of Packing stock.*

By the end of the fiscal year ended June 30, 1970, Packing had suffered losses due to changing market conditions, accounting procedures, and, in hindsight, unfortunate business judgments. With Packing's losses, the price of its stock declined.

It is appellant's position that the Government's proof at trial differed appreciably from the evidence presented to the grand jury and the charges in the Indictment (Information). This Statement of Facts will thus be divided accordingly.

B. *Proof Adduced at Trial Relative to the Charges in the Information*

1. THE INFORMATION—The Information in this case charged that defendants conspired to and did engage in stock manipulation, securities fraud, promulgation of a false and misleading offering circular relating to the 10,000 share offer in March, 1969, and mail fraud. The means

* The Government sought to prove at trial that the Funds were induced to purchase by various misrepresentations concerning, among other things, Packing's financial condition and the number of franchises sold. There was no mention in the Indictment, Information, or Bills of Particulars that defendants would be charged with such misrepresentations. The only charge in the Information with respect to the Funds' purchases was that the Funds were induced to purchase from accounts over which Deutsch and DuBoff exercised control or in which they had a beneficial interest. Even if it could have been proved that Deutsch and DuBoff knew any such statements were false, it is clear, in any event, that the Funds, with their research and review committees and highly sophisticated individuals at their control, were neither misled by, nor purchased stock because of them, but rather made their purchases because of the ability to control the float, and their own independent research. Indeed, the Government chose to take the tortured position that Hurly, as co-conspirator, was both perpetrator and victim.

by which defendants were charged with carrying out these violations of the law were the following:

(a) that Deutsch and DuBoff, for the purpose of causing the price of Packing stock to rise in the open market, caused accounts over which they exercised control or in which they had a beneficial interest to purchase and sell Packing stock so as to restrict its available supply and create the appearance of market activity;

(b) that Deutsch and DuBoff arranged with KAB for KAB to trade Packing stock as directed by Deutsch and DuBoff, in exchange for secret kickbacks amounting to 30% of the net profits received by KAB from those trades; and those kickbacks, amounting to $15,000., were paid to Deutsch and DuBoff in the form of KAB payments to the Reiss Bank in Switzerland;

(c) that Deutsch and DuBoff, for the purpose of causing the price of Packing stock to rise in the open market, induced the Denver Funds to purchase Packing stock through Jaffee from accounts over which they exercised control or in which they had a beneficial interest and other accounts, so as to restrict its available supply and create the appearance of market activity;

(d) that as a result of their manipulative activities, the defendants caused the price of Packing stock to rise from $25. to $53. per share, and caused the Denver Funds to lose about $5,100,000.; and

(e) that Cohen and Deutsch caused to be filed with the SEC, and that they and their co-conspirators caused to be mailed to various persons a false and misleading offering circular in connection with the March, 1969 offering circular, which failed to

disclose (i) that the offering was not being made to the public but was being offered to and purchased by accounts over which Deutsch and DuBoff exercised control or in which they had a beneficial interest; (ii) that Deutsch, DuBoff, KAB and Shwidock were underwriters in this public offering; (iii) that Deutsch, Cohen and Shwidock had determined in advance of the offering the amount of the proceeds at $280,000., while the offering circular had stated that the proceeds would be determined by the market and could be as high as $300,000.; (iv) that Packing would not offer the shares through solicitation by its directors, officers and employees as had been stated in the offering circular; and (v) that Deutsch and DuBoff had and would receive compensation including Packing common stock and stock options, for services to Packing including the offering.

2. OFFERINC CIRCULAR—There was no proof that appellant took part in the preparation of the Offering Circular, or knew what its contents would be. In fact, the testimony at trial indicated that it was Alvin Malmon ("Malmon"), Packing's counsel and a member of its Board of Directors, who was responsible for the preparation of this document, and that even Cohen relied upon Malmon's expertise as to its contents.* No information was concealed from Malmon by anyone, nor was he denied any information he requested.

(a) *Preparation*

Malmon testified that he had prepared the March 11, 1969 Offering Circular by taking the offering from Packing's first public offering of August, 1967, and:

> "[going] over the items which I, as legal counsel, deemed to be necessary in a new offering circular

* Malmon testified that he specialized in work involving the 1933 and 1934 Securities Acts, and often received referrals of work from other lawyers because of his role as a specialist. (Tr., pp. 477-78) (206, 207)

> with Mr. Cohen supplying me with those portions of the information that was necessary for that offering circular from his information, and my providing from my own files such information as the number of shares of stock outstanding and the things that were within my knowledge." (Tr., p. 84). (121-c)

He sent a draft of the circular to Cohen, he and Cohen went over the draft together "line by line", and he had Cohen sign the notification on Form 1-A. These documents were filed with the SEC in December, 1968. (Tr. pp. 85-87) (121-d—121-f) He later also went over with Cohen the SEC's comments on the Offering Circular and, finally, the printer proof. (Tr., pp. 87-89) (121-f—121-h) Malmon testified that no one had asked him to leave out any information in the Offering Circular. (Tr., p. 497) (220) He also admitted that he was responsible for collecting the information for and filing the SEC Form 2-A report subsequent to the public offering, that Cohen or someone from Packing gave him the information concerning the use of proceeds received from the offering, but that he never inquired of Cohen how the issue had been sold. (Tr., pp. 91, 242-44, 447) (121-f, 172-174, 193) There was no evidence that Deutsch or DuBoff took part in the preparation of the Offering Circular, or that they in any way caused it to be filed with the SEC.

(b) *Alleged Failures to Disclose*

(1) *Amount of Proceeds*—The Offering Circular stated that the stock would be offered to the public at its market price on the date of sale, estimated to be $30.00 per share. The circular went on to state:

> "The above stated offering price is only an estimate of the price at which the shares will be sold. The actual price will depend upon the market price of the shares at the time of sale. *Thus the actual total sales price could be less than $300,000.00. but it can-*

> *not exceed $300,000.00.* If the total selling price of the shares reaches $300,000.00 before all 10,000 shares have been sold, no further shares will be sold and under no circumstances will more than 10,000 shares be sold." (Govt. Exh. #5B) (1750) (Emphasis supplied)

The Government sought to prove that this statement was false and misleading in that the amount of the proceeds had been pre-determined.

Bernard Shwidock, principal of KAB, testified that in February, 1969, he was introduced to Cohen in Deutsch and DuBoff's presence, as the broker who would give Cohen the $280,000.00 that was to be the proceeds from the sale of Packing stock in conection with this public offering. (Tr., pp. 1039-41) (366-368) There was also introduced a letter dated March 5, 1969, from Cohen to Shwidock, in which Cohen stated, "I would appreciate your handling of the sale. We would not expect to get less than $28.00 per share." (Cohen Exh. F)* (2127) Packing did, in fact, receive $280,000.00 in proceeds from this public offering.** (Govt. Exhs. 13A-D) (1800-1801):

(2) *Method of Sale*—The Offering Circular stated that:

> "It is anticipated that the stock will be sold to the public by directors, officers and employees of the Company and may also be sold through certain securities dealers who are members of the National Association of Securities Dealers, Inc. who will not

---

* Cohen, of course, did not state that the price was to be set at $28.00 per share, but simply that he did not expect to get any less.

** In the Form 2-A, the amount received was shown as $300,000. Malmon testified that the only plausible explanation was that he had looked at the Offering Circular, seen that the company hoped to get $300,000. and on that basis, without regard to what actually happened, and without inquiring further, had put that figure in the 2-A. (Tr., pp. 447-48) (193-195).

> be under any duty to subscribe. . . . In the event that brokers or securities dealers are employed, the Company's notification statement and Offering Circular will be promptly amended to furnish additional information. (Govt. Exh. 5B) (1752)

This statement was alleged to have been false and misleading in that none of the shares were sold by Packing's directors, officers, or employees, but this fact was never disclosed in an amended Offering Circular or in the Form 2-A report. Malmon testified that when he was preparing the Offering Circular, Cohen told him that the stock would be sold by the company's officers and directors, mostly himself, and that he was going to get help with prospects for sales from Deutsch. (Tr., p. 85) (121-d) However, by letter dated March 19, 1969, Cohen informed Northwestern National Bank, Packing's transfer agent, that the sale of the 10,000 shares had been completed and directed to the Bank to issue the shares to KAB. (Govt. Exh. 9-C) (1779) These 10,000 shares were all subsequently sold with KAB acting as the billing agent. (Govt. Exhs. 14-A, 14-B, 15-A, 16, 17-A, 18-A) (1799A, 1799B, 1799C, 1799D, 1799E, 1799F). Malmon admitted that he was responsible for collecting the information for the Form 2-A report, that the fact of KAB's involvement was not concealed by anyone from him, but that he never inquired as to how the stock had been sold. (Tr., pp. 447, 489, 498) (193, 212, 221) In fact, Malmon prepared the March 19, 1969 letter directing issuance of the 10,000 shares to KAB for Cohen's signature, but never inquired of Cohen as to the circumstances surrounding this transfer. (Tr., p. 245)* (176) Had he inquired and determined the method of sale, he still did not feel that an amendment was necessary. (Tr., pp. 91, 242-

* Indeed, Malmon had in his files a letter dated March 5, 1969 from Cohen to KAB which stated: "I would appreciate your handling of the sale." (Cohen Exh. F [2127]), although he claimed not to have seen this letter prior to producing documents to the Government. (Tr., p. 235) (168)

44, 447) (121-j, 172-174, 193) The decision not to disclose the method by which the stock was sold was Malmon's alone. Nor was any testimony introduced which would indicate anyone but Malmon had the expertise to make a decision regarding the necessity for the disclosure of those facts.

(3) *Offerees and Purchasers of Stock*—By its Offering Circular, Packing offered to sell 10,000 shares to the public. (Govt. Exh. 5B) (1750) The Government alleged that these shares were sold not to the public, but to accounts over which Deutsch and DuBoff exercised control or in which they had a beneficial interest, namely the accounts of Morginstin, Harris, FVF and KAB*. It was uncontested that out of the 10,000 new issue shares, KAB bought 2,000 shares, 500 of which it resold to the firm of S.J. Butler and the remainder of which went into its own trading account; that 1,500 were sold to Morginstin, 1,500 to Harris; and that 5,000 were sold to Jaffee and ultimately resold to the Denver Funds.

As to the defendants' alleged control over the accounts to which the new issue shares were sold, Shwidock testified that in January, 1969, DuBoff directed him to open accounts at KAB for Morginstin and Harris, explaining that any trading done in those accounts was to be done by either him or Deutsch, and that KAB was not to do anything with those accounts except to take instructions. (Tr., pp. 1055-57) (381-383) These accounts therefore were kept as discretionary accounts (Tr., pp. 1361-62) (410-411) and

* The confusion of the Government's theory is readily apparent here. According to this allegation, the sale of Packing's 10,000 new issue shares was not a public sale. Yet the Government took the position, as its expert witness testified, that this was not a private sale, the Government never chose to reveal what kind of a sale it was. Appellant contends that the sale of a limited number of shares is no less public by reason of the fact that willing customers are few, rather than myriad, in number, particularly, where, as here, the number of shares was relatively small.

both Morginstin and Harris testified that they had given Deutsch and DuBoff, respectively, such complete discretion over their investment decisions, that they did not generally discuss with either Deutsch or DuBoff the purchase or sale of stocks. (Tr., pp. 3384-85, 3472) (1043-44, 1049) As Morginstin put it, "It would be the same thing that if I went to a doctor, I would go to a doctor for advice in the same way that I went to Mr. Deutsch for advice, and gave him permission to handle all my stock transactions for me." (Tr., pp. 3384-85, 3472) (1043-44, 1049) Deutsch and DuBoff's alleged control over KAB will be discussed in connection with the Government's charge of manipulation, *infra*, pages 16-18.

(4) *Stock Options and Warrants*—The Offering Circular stated that:

> "75,000 shares of common stock were reserved for issuance pursuant to a plan adopted by the Board of Directors to grant stock options to key employees of the Company and persons who have rendered valuable services to the Company." (Govt. Exh. 5B) (1758)*

The Government sought to prove that Deutsch and DuBoff received stock options as compensation for their services as underwriters in connection with the public offering.

There was no proof that Deutsch or DuBoff received options as compensation for selling stock. The issuance of the stock options was almost two months prior to the decision to file a Regulation A offering for the 10,000

* The Information charges that the portion of the Offering Circular relating to stock options was false and misleading only in that it failed to disclose "that the defendants Bernard Deutsch and Stanley DuBoff, in return for services to Richard Packing, including the instant offering, had received in the past and would receive in the future, compensation, including Richard Packing common stock and stock options." (§ 11(a)(5))

shares. Cohen relied upon Malmon to prepare the Offering Circular, and Malmon had the responsibility to inquiry into any circumstances he deemed material to disclosure in the Offering Circular. Malmon testified that in September, 1968, Cohen asked him to prepare Board of Directors' resolutions authorizing the issuance of stock options, all contained on a list Cohen gave him. (Tr., pp. 103-4) (122, 123) The list was as follows:

Wilton J. Jaffee	10,000 shares	$15.00*
Jaffee & Co.	1,500 shares	15.00
Rochelle DuBoff	2,000 shares	15.00
Sheila Deutsch	2,000 shares	15.00
Harry Morginstin	5,000 shares	6.00
William Harris	5,000 shares	6.00
Alvin S. Malmon	1,000 shares	6.00**

Cohen told Malmon these options were to be granted for services rendered and to be rendered, of a financial nature and in connection with the establishment of the company's franchise program by these people.*** (Tr., pp. 109-110) (128, 129) Malmon stated that the wording of the Board of Directors' Resolution, to wit that the options were

---

* These options involved the right to buy restricted shares. Malmon testified that the options at $15 were substantially worthless, and that while those at $6 had some value, they were not worth much. (Tr., pp. 189-91) (151-154). Maimon was also the only individual on this list who exercised his option. (Tr., p. 556) (233). Malmon, a Director, never requested a delineation of the services rendered, and he, of course, was familiar with both the Deutsch and DuBoff names, and with their contributions to the company franchise program.

** On November 5, 1969, Cohen wrote Maimon asking him to break down Jaffee's 10,000 share option as follows:

Howard Herman ..... 500 shares
Stanley DuBoff ..... 750 shares
Bernard Deutsch ..... 750 shares
Jaffee ..... balance of 8,000

(Govt. Exh. 7) (1770)

*** Malmon admitted that he had testified in the Grand Jury that Cohen had only told him that all of the listed individuals had rendered services in the past. (Tr., pp. 194, 474) (155, 203)

granted to the listed individuals "for their services *rendered*" (emphasis added) was his wording. (Tr., p. 554) (232) He also knew that Deutsch had performed services for the company in the past, including introducing the company to people who could develop ideas for it. (Tr., pp. 472-75) (201-204) There was no testimony, nor could there be, that such options issued in September, 1968, were intended as compensation for facilitating the sale of stock in the March, 1969 offering: nor that the breakdown of the shares in November, 1969 had any relation to the March offering. According to Malmon, the summary of the stock option situation in the Offering Circular was a sufficient disclosure of the facts as he knew them from the company's records. (Tr., p. 225) (159) He never instructed Cohen that if the options were compensation for services to be performed in connection with the public offering, that fact should be reported. (Tr., pp. 491-92 (214-15) Nor did he ever discuss these options or the amount of these options with Deutsch. (Tr., p. 468) (200)

(5) *Underwriting*—The Offering Circular stated that: "The Company had not entered into any underwriting agreement for the sale of its securities as of the date of this Offering Circular. However, any participating securities dealer may be deemed to be an underwriter within the meaning of the Securities Act of 1933 . . ." (Govt. Exh. 5B) (1759)

The Government alleged that the offering was in fact underwritten by KAB, Deutsch and DuBoff.

With respect to KAB, Deutsch and DuBoff's actual role in the sale of the new issue shares, Shwidock testified that in February, 1969, Deutsch told him that KAB was to send out confirmations on the sale of the new issue of Packing stock. (Tr., pp. 1036-38) (363-65) When he received the Offering Circulars in March, he called DuBoff concerning the names for billing. DuBoff told him he would get these names together, but, in the meantime, KAB could take

'1,000 of the new issue shares at $28. per share into its trading account to cover a short position it had incurred in 1968. (Tr., pp. 1042-45) (369-373) KAB did so on March 14, 1969. (1799A, 1799B, 1799C) (Govt. Exhs. 14-A, 14-B, 15-A) Shwidock also testified that when he asked DuBoff a few days later for the rest of the names for billing, DuBoff told him to bill Jaffee, the investment trading house for whom he worked, for 5,000 shares at $28.50 per share. (Govt. Exh. 16) (1799D) Shwidock later called DuBoff and told him that 3,000 shares of the new issue remained unsold. DuBoff told him to put 1,500 shares at $28.25 in the account of Harry Morginstin, Deutsch's brother-in-law, (Govt. Exh. 17-A) (1799E), and 1,500 shares at $28.25 in the account of William Harris, DuBoff's father-in-law (Govt. Exh. 18-A) (1799F), (Tr., pp. 1049-51) (376-78). Both of these were discretionary accounts which Deutsch and DuBoff administered.

Both Shwidock and Malmon, who was responsible for preparing the documents filed with the SEC, testified that these facts did not constitute an underwriting. (Tr., pp. 212, 1136-38) * (158, 399-401)

---

* Shwidock testified that KAB was handling the sale of this new issue of Packing stock only to the extent of being the billing agent. (Tr., pp. 1136-38) (399-401). Malmolm, who professed to specialize in securities law practice, see page 6, *supra*, testified not only that there was no underwriting in connection with this offering, but also that if KAB had simply done the billing and not found prospective buyers, they should not have been shown as underwriters and the failure to disclose them as billing agents would not have been a material omission. (Tr., pp. 246-47) (177-178). Nor, in his opinion, would it have been necessary to divulge that Deutsch had furnished prospects for sale. (Tr., p. 486) (210). The Government called an SEC attorney, Ruth Appleton, as an expert witness, to testify that in her opinion, a firm which performed the acts KAB and Deutsch performed, was an underwriter. (Tr., pp. 1687-91) (561-65). Appellant contends that it was plain error for the Court to have allowed this expert testimony, particularly coming as it did from a Government attorney whose agency is responsible for securities law enforcement, to testify

(footnote continued on next page)

Malmon also testified that the fact KAB was involved was never concealed from him, but that he simply never asked Cohen how the issue of 10,000 shares had been sold prior to filing the form 2-A, nor did he ask anyone what the nature of KAB's involvement was. (Tr., pp. 242, 447, 489) (172, 193, 212) Although he drafted Cohen's March 19, 1969 letter to Northwestern directing the issuance of all 10,000 shares to KAB, he never asked Cohen, about the circumstances surrounding the transfer, despite his knowledge that KAB was a brokerage house and his admission that this letter should have suggested to him that KAB might be acting as underwriter. (Tr., pp. 245-46) (176-177) Thus, even if the facts of the sale did constitute an underwriting, Malmon was delinquent in not so advising his client.

3. ALLEGED MANIPULATION—The Information charged and the Government sought to prove at trial, that Deutsch and DuBoff manipulated the price of Packing stock, resulting in a price rise from $25. to $53. per share, and in losses to the Denver Funds of $5,100,000., by (1) causing accounts over which they exercised control or in which they had a beneficial interest to purchase and sell;* (2) by ar-

---

(footnote continued from previous page)

to this ultimate fact. Nevertheless, Ms. Appleton also testified that whether or not an individual is deemed an underwriter depends upon one's opinion of the securities laws, (Tr., p. 1767) (584), and that she would expect a person in Cohen's position to rely on his lawyer, to tell him who is an underwriter. (Tr., pp. 1701-02, 1791-92) (570-71, 592-94). She also testified that if a lawyer learned that KAB had participated in an offering, it was his responsibility to bring it to the attention of his client and to tell his client that fact must be disclosed (Tr., pp. 1707-12) (572-577).

* In its Bill of Particulars dated March 27, 1974, the Government alleged with respect to this charge that Deutsch and DuBoff had a beneficial interest in the accounts of Harry Morginstin, Beatrice Morginstin, William Harris and Rose Harris; that Deutsch and DuBoff were undisclosed principals of New Dimension Securities; and

(footnote continued on next page)

ranging with KAB for KAB to trade stock as they directed the return for kickbacks; and (3) by inducing the Denver Funds to purchase stock through Jaffee from accounts over which they exercised control or in which they had a beneficial interest so as to restrict the available supply and create the appearance of market activity.

(a) *KAB's Alleged Kickbacks to Deutsch and DuBoff**

Shwidock testified that in early October, 1968, after he agreed with Deutsch and DuBoff to pay Deutsch and DuBoff 30% of KAB's profits in the trades of stock they directed through KAB, Deutsch introduced him to Jack Reiss, head of the Reiss Bank in Switzerland. (Tr., pp. 927-28) (341-342) Shwidock testified that after this introduction DuBoff suggested that KAB subscribe to Reiss' investment advisory service, that KAB's $10,000. per month payments for that service could work against the 30% cash "kickback" (Tr., pp. 929-30), (343-44) and that Shwidock could keep the Reiss material in his file in case the authorities came around asking him what he got for his money. (Tr., pp. 947-48) (347-48) Shwidock then paid Reiss a total of $90,000. for Reiss' investment advisory service (Tr., p.

(footnote continued from previous page)
that Cohen had control over accounts in his own name, those in the name of Packing, its subsidiaries and affiliates, and accounts of family members and family corporations or trusts. In its amended Bill of Particulars dated April 12, 1974, the Government further alleged that Deutsch and DuBoff in large part directed and controlled the trading of Packing stock through the trading accounts of KAB, New Dimension and Naddeo.

* The Proof as to these alleged "kickbacks" was admitted as relevant only to the extent that it established motive, intent and knowledge of the conspiracy. The "kickbacks" themselves were not illegal pursuant to any of the statutes cited in the Information, nor was there evidence that the payments were related to the alleged manipulation.

969, (349) Govt. Exh. 24A-E),* (1862-71) although he testified that the material he received (Govt. Exhs. 21A-21F; 21AA-21GG) (1802-1813; 1842-1851) was unrelated to his business.** (Tr., p. 932) (346)

Shwidock also testified that he had paid some bills in the amount of $3,075.00 for art work for DuBoff which were also charged against the 30% cash "kickback". (Tr., pp. 993-96, Govt. Exhs. 25-A, 25-B) (352-355, 1872-75) The Government presented the jury with this wholesale proof in the apparent expectation that the jury could find that somewhere among all these payments by Shwidock, was $15,000. in kickbacks to Deutsch and DuBoff pursuant to their alleged agreement relating to Packing. Not only was it never proved that Deutsch and DuBoff did in fact receive $15,000.

* The Court specifically directed the jury that the defendants were not charged with receiving this $90,000., and that the jury was to consider this testimony solely with regard to whether Shwidock paid part of the $15,000. to defendants through this means. (Tr., pp. 1122-1122A) (397-398). Despite this admonition, the Government specifically argued from the total amount of $90,000. in its summation (Tr., pp. 5211-12), and the Court failed to correct the statement despite objection. (Tr., pp. 5254, 5261) (1533, 1540).

** Shwidock admitted telling Deutsch in September, 1973, that his subscription to the Reiss Bank's services was unrelated to obtaining business from Deutsch. (Tr., p. 1367) (412). Harvey Pohl, KAB's auditor during this time period, also testified that in July, 1969, Shwidock told him that the checks sent to Reiss concerned some Israeli deal he had been working on (Tr., pp. 4830-31; DuBoff Exh. K) (1373-74; 2165). Apparently, in an effort to show that it was Deutsch, not Shwidock, who had a relationship with the Reiss Bank, since the Government was unable to demonstrate that Deutsch or DuBoff had an account there, the Government called Perry Leff, who was permitted to testify that in June, 1970, Deutsch had arranged a $100,000. loan to Leff's company, Dimension 5. Leff stated that one of the bank drafts Deutsch gave him to cover this loan did not clear. Leff then, in August, 1970, received a substitute draft, in the form of a personal check of someone named Glasser drawn on the Reiss Bank (Tr., pp. 2418-42) (815-841). This was not a bank check, and there was no testimony as to Glasser's relationship to the Reiss Bank. Deutsch, or any Deutch account.

in kickbacks, or had an account at the Reiss Bank, but also the way in which this figure was arrived at remains a mystery, since the alleged payments and the art work constitute an amount in excess of 30% of KAB's $50,540.50 profits in the trading of Packing stock.* Further, 30% of the monthly profits of KAB were less than the payments being made to the Reiss Bank by KAB during this period. (Tr., pp. 1610-12) (507-09)

(b) *Trading through Allegedly Controlled Accounts*

(1) *Morginstin and Harris Accounts*—Shwidock testified that DuBoff told him the Morginstin and Harris accounts were his and Deutsch's accounts, and that KAB was not to do anything with these accounts except to take instructions. (Tr., pp. 1055-57) (381-383) Shwidock also testified, as did Mrs. Quinn, his secretary at KAB, that the Morginstin and Harris accounts were the largest or most active accounts at KAB (Tr., pp. 280, 1064-65) (186; 385-86) However, these accounts were run by KAB as discretionary accounts (Tr., pp. 1361-62) (410-11) and both Morginstin and Harris testified that because of their ignorance of the stock market, they had given Deutsch and DuBoff, respectively, complete discretion over their stock investments. (Tr., pp. 3384-85; 3472) (1043-44; 1049).

Actually, the only transactions in Packing stock in these accounts during the six-month period before the date of the public offering were sales on January 14, 1969, to Harris

* In fact, $45,000. of KAB's profits was earned between October 4 and October 7, 1968, as a result of KAB's being able to obtain 10,000 shares from Jaffee at a bargain price. (Tr., pp. 1486-87; DuBoff Exh. B) (455-56; 2160) Shwidock testified that it was customary and a daily occurrence that large blocks of stock, especially in relation to the number of shares outstanding, were sold at bargain prices (Tr., p. 1628) (512), a fact that would have cut the Deutsch and DuBoff alleged "kickback" profit. In fact, Deutsch and DuBoff could have themselves sold the 10,000 shares and kept all, not 30%, of the profits made by Shwidock. (Tr., pp. 1629-32) (513-516).

and Morginstin of 300 shares each at 22 and 22¼ respectively and sales by Morginstin and Harris on January 15, 1969, of 350 shares each at $25. (Tr., pp. 1495-96; 1506) (464-65; 467)

(2) *KAB and Naddeo*—Shwidock testified that pursuant to his agreement with Deutsch and DuBoff regarding trades through KAB*, Deusch or DuBoff would telephone and advise him that he had sold or bought a specified amount of Packing stock at a certain price to or from a designated broker. He would then call that broker to confirm the transaction, and mail out a confirmation. (Tr., p. 925)** (339)

Mazzeo, a principal of Naddeo, testified regarding transactions with Deutsch and DuBoff relative to the shares of Packing stock that Naddeo sold to Jaffee.*** In some cases,

---

* Shwidock testified that in early September, 1968, before KAB had opened for business, he had gone to Jaffee, among other brokerage houses, looking for business. Deutsch and DuBoff declined to give him business at that time, because KAB was a new firm and unknown to them. Shwidock asked if they had any stock he could go in and trade, and Deutsch and DuBoff suggested Packing (Tr., pp. 912-15, 1383) (329-332; 419). Between that meeting and the time Shwidock testified he had made his deal with Deutsch and DuBoff, KAB bought 1200 shares of Packing stock at $26., $30., and $31. per share. (Tr., pp. 1393-95) (423-25).

** Shwidock also testified that he had instructed his secretary, that in case of his absence, she was to execute immediately any orders she was called about by Deutsch or DuBoff. (Tr., p. 927) (341). Mrs. Quinn testified that pursuant to this instruction, she had called certain brokers to confirm transactions Deutsch or DuBoff had ordered, but she could not remember what specific stocks these orders related to. (Tr., pp. 342-43) (187-188).

*** Mazzeo testified that after seeking out Deutsch and DuBoff in hopes of getting business from them (Tr., pp. 3278-79) (1002-03), DuBoff asked him to make an active market in Packing stock and to keep him informed of any sell orders he saw in the stock because he and Deutsch were principal buyers. (Tr., pp. 3194-95, 3283-84) (981-82; 1007-08).

he would receive a bid from Deutsch or DuBoff, who would tell him where the stock was for sale. He would then contact or be contacted by that brokerage house, buy the stock, and in turn sell it to Deutsch or DuBoff and make a market himself. (Tr., pp. 3197-99)* 984-986) However, the only firm Mazzeo could name to which he was directed by Deutsch or DuBoff to purchase Packing stock was KAB (Tr., pp. 3260-64, 3300-02, 3333-41), (995-1000; 1019-21; 1031-39) and he could not recall any transaction between KAB and Naddeo other than a purchase of 3000 shares on April 4, 1969 (Tr., p. 3262), (998) which covered Naddeo's short position in Packing stock. (Tr., pp. 3300-02) (1019-21) With respect to prices paid through these "directed trades", Shwidock testified that he might have called other brokers to determine the prices at which they were buying and selling Packing stock (Tr., p. 1390), (420) and that the only reason Deutsch or DuBoff told him to buy or sell at a certain price was that they thought that price was the price at which he could obtain the stock. (Tr., p. 1391) (421) In addition, he testified that the price at which he was prepared to buy or sell stock changed from time to time during the day because of what was taking place in the market (Tr., pp. 1423-24), and that he bought and sold at the best prices he could get. (Tr., p. 1425) (445) Mazzeo also testified that the bids he received from Deutsch and DuBoff correctly reflected the market price (Tr., p. 3289) (1009) and that when he dealt with a firm to which he was directed he went in and showed his bid in the same way he would have negotiated a price if he hadn't been told that stock was available at that firm. (Tr., pp. 3297-98) (1017-1018) Indeed, he testified that Deutsch and DuBoff did not buy all the Packing stock he showed them, and that

* Mazzeo testified that he stopped buying stock for Deutsch and DuBoff in October, 1969, because DuBoff thought that he was moving the market around to his "feel" as a trader when he had no orders, rather than maintaining the market DuBoff wanted to maintain in the stock. (Tr., pp. 201-02) (156-57).

when they did, there were times when they suggested they would be willing to buy it, but at a lower price. (Tr., p. 3305) (1023) Both Shwidock and Mazzeo also testified that they thought there was nothing wrong with these "directed trades". (Tr., pp. 1381-82, 3292)* (417-18; 1012) Both testified that it was normal for Jaffee, a non-market maker, to turn to firms such as KAB and Naddeo, when it wanted to buy or sell stock. (Tr., pp. 1377-78, 3293-95, 3257, 3278) (413-14; 1013-15; 992-A, 1002) In fact, Mazzeo testified that the purpose of Jaffee's using such firms was to keep the price of stock down, not to cause it to rise. Mazzeo testified that if Jaffee had gone out and purchased the stock itself, it would have had to pay the higher offering price, while Naddeo was able to purchase at close to the lower bid price. (Tr., p. 3291 (1011) Leonard Mayer, clearly an expert in the securities field (Tr., pp. 4841-45), (1380-84) also testified that it was not unusual for a person placing an order to tell a market-maker where to go and pick up stock, because if the buyer had a continuing interest in a stock, he might know better than the market-maker where the stock was. (Tr., p. 4873)** (1410)

(3) *New Dimension*—Somer Jack Rothman, New Dimension's cashier, testified that the way Packing shares were traded through New Dimensions was similar to the way they were traded through KAB and Naddeo. Deutsch or DuBoff would call in the morning and state that New

* Mazzeo even testified that it was accepted on Wall Street that Jaffee, being a strong financial house, could go to any other brokerage house and, without asking for quotations, say, "I want to buy x number of shares at this price." (Tr., pp. 3258-59 (993-994).

** When asked whether persons placing orders would tell a market-maker the price at which the market-maker had to buy to fill that order, Mayer did not testify that this was not done, but said only that he would not be bound by such a direction: "Well, I like to consider myself a market-maker, an independent individual, so no one tells me what to do. I do as I see fit." (Tr., p. 4874) (1411).

Dimension was selling them a certain amount of Packing stock at a certain price, a price set without negotiation, and that New Dimension should go out and pick up that stock from a certain broker at a certain price, and, in turn, sell it to Jaffee. (Tr., pp. 3509-12) (1071-74) Deutsch or DuBoff would also call to ask him to call other brokers and buy as much Packing stock as he could at a certain price, he would call them back to tell them how many shares he had bought, and Deutsch or DuBoff would then buy that stock at prices they set. (Tr., pp. 3512-13) (1074-75)

However, Rothman testified that he only answered the telephone 20% of the times Deutsch or DuBoff called (Tr., p. 3753), (1133) and that it was possible that when Deutsch or DuBoff made those calls, they had already called to negotiate on price the day before. (Tr., pp. 3691-92) (1123-24) In fact, Mayer testified that the usual parlance in a call following the making of a bid, would be, for example, "I bought 2000 at 40." (Tr., p. 4894) (1421) The Government also introduced a plethora of evidence to show that Deutsch and DuBoff were in fact undisclosed principals of New Dimension.*

With respect to the formation of New Dimension, Hurley testified that Deutsch had spoken to him in July, 1969, about joining a new brokerage business he wanted to open, and that later, in January, 1970, Deutsch wrote on a slip of paper proposed percentages of ownership which included a percentage for Deutsch and DuBoff. (Tr., pp. 1897-1911; Govt. Exh. 37) (650-670; 1883) In February or March, 1970, Deutsch showed him an office in Los Angeles, the door of which was marked "Dimension Man-

* The only issue according to the Information and Bills of Particulars was whether Deutsch and DuBoff controlled the trading of Packing stock through New Dimension. The evidence relating to the reasons why New Dimension was formed and whether Deutsch and DuBoff concealed their interest not only was inconclusive, but also served only to prejudice defendants in the eyes of the jury.

agement". Deutsch told him "Dimension Management" was a partnership between him and DuBoff, and that the west coast branch of New Dimension would be located in this office. (Tr., pp. 1912-15) * (671-674)

Somer Jack Rothman testified that in the early Summer of 1969, Deutsch told him that Ryback was starting a new brokerage firm, that he was helping Ryback out, and asked if he would be interested in a job as a cashier. (Tr., pp. 3486-89) ** (1056-59) Rothman subsequently did go to work at New Dimension after it was formed in December, 1969.*** Rothman testified that after he had gone to work for New Dimension, Ryback told him New Dimension was going to move uptown to a townhouse, and that he should write out checks for rent there. (Tr., p. 3572; Govt. Exhs. 73-D, 73-E) (1090; 1910, 1911) He also testified that he was directed to pay a bill for furniture purchased by the DuBoffs. (Tr., p. 3620) (1115-B) Finally, he testified that he was directed to make out checks to pay for renovation work on this townhouse, and that this work included

* Another witness, Perry Leff, testified that in the Fall of 1969, Deutsch told him that he intended to establish on the west coast a division of a company which had been started in New York, but he could not remember if Deutsch identified the company as New Dimension. (Tr., pp. 2412-13) (813-814).

** Rothman admitted telling the United States Attorney's Office that the initial approach concerning this job had been from Ryback.

*** Apparently in an effort to show that Packing was also helping New Dimension to get on its feet, the Government called Rothman who testified that Packing sent a check dated December 31, 1969, for $200,000. to New Dimension. Ryback told Rothman that this check was for Packing's opening up a customer's account. While Packing was listed on New Dimension books as having a trading account, (Govt. Exh. 72) (1902-05), Rothman testified that Packing never made any trades through New Dimension, and Packing's money was refunded in parcels. (Govt. Exhs. 71-B through 71-F) (1896-1901) In any event, this money represented a liability to New Dimension, reducing the firm's net capital so as to limit the liabilities New Dimension could incur. (Tr., pp. 3723-25) (1127-29).

installation of a pool and sauna. (Tr., pp. 3588, 3607-08; Govt. Exhs. 74-A—74-C) (1107, 1115-115-A, 1916-1918) The townhouse on 38th Street was eventually purchased by Deutsch and DuBoff.

The Government stated it was offering this evidence to show that Deutsch and DuBoff were receiving the profits made by New Dimension in the trading of Packing stock. (Tr., pp. 3547, 3565) (1088, 1089) However, the facts were that prior to April, 1970, Status Marketing leased the townhouse from its owners, some individuals named Spadea. In April, 1970, Status Marketing assigned its lease to New Dimension, New Dimension supposedly paying $20.000. therefor (Govt. Exh. 73A) (1906), although this payment was treated on New Dimension's books as a leasehold improvement. (Govt. Exh. 70-F) New Dimension then began paying rent to Status Marketing.

While Status Marketing was the lessee, it had an option to purchase the townhouse. Status Marketing agreed with Deutsch and DuBoff to exercise that option, Deutsch and DuBoff paid Status Marketing $27,500., the amount required to the exercise of this option, and Status Marketing then assigned its contract rights to Deutsch and DuBoff. (Govt. Exh. 80-A) (1966) Thus, it was not until June 9, 1970, a matter of weeks, according to the Information, before the alleged stock manipulation was terminated, that DH & DF, Deutsch and DuBoff's partnership, became the owner of the townhouse and acquired the landlord's interest in the property. (Govt. Exh. 80) * (1948-95)

With respect to the improvements to the townhouse, there was no testimony that New Dimension did not intend eventually to set up business there, or that payments were

* When Status Marketing assigned its lease to New Dimension in April, 1970, New Dimension reimbursed Status Marketing for its $10,000. security deposit on that property. When DH & DF became owners of the property, of course, the previous owners assigned the security deposit to them.

not made in fact for furniture that would be for New Dimension's benefit. Frank Austin, the interior decorator, testified that it was Deutsch and DuBoff's intention to enter into a business relationship at that address. In fact, Rothman testified that New Dimension had paid for Bunker Ramo equipment and for the installation of telephone lines at the townhouse. (Tr., p. 3703) (1125)

(c) ***Actual Trades in Packing Stock Prior to Purchases by Denver Funds Beginning on March 18, 1970***

The Government stated in its opening statement that "the real purpose and the real goal" of Deutsch and DuBoff's activities in connection with the trading of Packing stock up to this time "was to find a large investor or a number of investors willing to buy large amounts of Richard Packing stock at high prices". (Tr., p. 23) (101) Not only does the testimony indicate that Deutsch and DuBoff's purpose in using over-the-counter firms was not to raise the price but to keep it down, *supra*, pp. 17-18, but also the documents reflecting the actual trading in Packing stock prove that Deutsch, DuBoff and even Shwidock, who was named as an unindicted co-conspirator, were not manipulating the price upward prior to purchases by the Denver Funds.

In October, 1968, KAB bought two 5,000 share blocks of Packing stock from Jaffee at $28. when the market was about $31.-$32., and within a day or two, sold these shares at a profit. (DuBoff Exh. B) (2160) Shwidock testified that it was a customary and a daily occurrence that large blocks of stock, especially in relation to the number of shares outstanding, were sold at bargain prices. (Tr., p. 1628) (512) He also testified that normally, placing that many shares on the market would cause the price to drop, and that KAB's ability to sell the shares at prices above $28. would indicate a substantial demand for the stock. (Tr., p. 1481) (450)

After October and until Packing's public offering in March, 1969, KAB purchased only about 5600 shares of Packing stock, and the price of Packing stock dropped except for a slight rise at the end of January, 1969. (DuBoff Exh. B)* (2160) The only large transaction in the entire five-month period between October, 1968 and Packing's public offering in March, 1969, was a *sale* on January 28th of 1850 shares. (DuBoff Exh. B) (2160) This pattern of trading hardly indicates "a real purpose and a real goal" to drive the price to a high level prior to the Denver Funds' purchases.

(d) *Purchases by Denver Funds*

(1) *Financial Industrial and Financial Dynamics Funds*—The only evidence linking Deutsch or DuBoff with purchases by the Financial Industrial and Financial Dynamics Funds was minimal, at best. Hurley testified that Robert Anton ("Anton"), FDF's portfolio manager, was present when Deutsch went to Denver in late 1968 or early 1969 at Hurley's invitation to discuss various stocks in which Jaffee was interested (Tr., pp. 1829- 30, 2179) (608-09; 736) and James Giasafakis, employed in Financial Program's investment research division, testified that he, Hurley, Anton, and James Frankenthaler, FIF's portfolio manager, would meet informally after work every night, that on occasion Deutsch would call and Hurley would report what Deutsch had said about Packing. (Tr., p. 2472) (859) There was no testimony about the content of either

* In November, KAB bought 100 shares at $30.; in December, KAB bought 1200 at $27. and $28., and sold 100 at $31.; in January, KAB bought 3300 shares at prices as low as $21. and $22., and sold in excess of 3000 shares at prices in the low $20's, prices which were lower than in the previous months, except that toward the end of the month, the price started going up. After the end of January, up to March 14, the date of the first sale of the new issue shares, KAB purchased only about 1000 shares at decreasing prices, and from February 25, to March 14, KAB made no purchases of Packing stock. (Tr., pp. 1478-93; DuBoff Exh. B) (447-462; 2160).

the telephone calls between Deutsch and Hurley, or of the information Hurley then passed on to the other funds managers. Nor did Hurley or Giasafakis testify that purchases were made because of the Deutsch information.

On the other hand, Hurley testified that the other Funds bought Packing stock after he told them about it (Tr., p. 2124), (725) and that he expected the price of Packing stock to rise when his Fund and the other Funds bought 75% of the stock, (Tr., pp. 2219-20)* (757-58) In fact, he testified, the fact that the other Funds were buying Packing stock assisted his own performance record. (Tr., p. 2234) (762) Thus, it was evident that the other Funds' purchases were attributable solely to Hurley's self-serving encouragement.

(2) *Financial Venture Fund*—The Government's case focused upon purchases by FVF. Yet the testimony indicated that after being introduced to Packing stock by Deutsch, Jack Hurley, FVF's portfolio manager, pursued a course of his own, in becoming heavily involved in that stock.

Hurley testified that some time between December, 1968 and March, 1969, at the suggestion of Hugh Deane, a salesman of Ward, Walker & Co., he called Deutsch to find out about Packing stock.** Shortly thereafter, at Hurley's in-

---

* He admitted having told the United States Attorney's Office that he knew when the other Funds purchased Packing stock that the price would be driven up. (Tr., p. 2242) (765).

** Deane testified that in late 1968 or early 1969, Hurley told him he was going to be heading up FVF, was interested in emerging, high-risk high-growth potential type securities, and asked Deane if he knew of anyone who could help him or of any such stock in which he could invest. Deane told Hurley that Jaffee had a fine record with a number of unusual stocks, and was currently interested in Packing stock. Deane told Hurley that he thought Packing stock was a good stock, and suggested that Hurley call Deutsch to get the details. (Tr., pp. 591-95, 1826-29) (252-56, 605-08).

vitation, Deutsch went to Denver and met with Hurley and Anton, portfolio manager of FDF for about an hour to talk about various stocks Jaffee was involved in, including Packing stock. (Tr., pp. 1829-30, 2179)* (608-09, 736)

In February or March, 1969, Deutsch called Hurley and told him that Packing was going to have a public offering from which the Funds could buy shares. Deutsch told Hurley that Packing stock was selling at about $32. a share, this offering would be well below that price, and the Funds would do well with the stock. (Tr., pp. 1839-41) (614-616) Hurley then submitted a buy sheet to Lambert Hirshheimer, a Vice-President of FVF, asking him to buy 5,000 shares at $28.50 per share. (Tr., pp. 1841, 2196-98) (616; 740-742) This trade occurred on March 18, 1969, and the stock was purchased through Jaffee & Co. (Govt. Exh. 49) (1889)

Hurley testified that by late April or early May, he had decided he was interested in taking a large position in Packing stock, and he told Deutsch that he wanted Deutsch to let him know whenever he found Packing stock for sale, because he would probably be interested in buying it. (Tr., pp. 1857-58) (620-621) Hurley testified that he decided to purchase from Jaffee not only because Jaffee would execute transactions expeditiously and at the best obtainable price, but also because of Deutsch's mind. (Tr., p. 2146) (729) After Hurley's decision to take a large position in Packing stock, FVF, and later the other two Funds, began to buy Packing stock on a consistent basis until, by April, 1970,

---

* Hurley testified that they had discussed Packing stock for only about five minutes. (Tr., p. 2192) (738) Hurley also testified that in meeting with him, Deutsch was doing exactly what other brokers who were interested in the Funds' business did and would do. (Tr., p. 195) (739).

they owned 75% of the float of Packing stock. (Tr., p. 2215; Govt. Exh. 49)* (753; 1889-92)

(3) *Alleged Manipulation in Sales to Denver Funds*—The Information charged that Deutsch "for the purpose of causing the price of Richard Packing stock to rise in the open market, induced [the Funds] to purchase Packing common stock through Jaffee & Co., . . . from accounts over which they exercised control or in which they had a beneficial interest and other accounts so as to (1) restrict the available supply of Richard Packing common stock to the investing public; and (2) create the appearance of market activity and demand in such stock."

The proof at trial indicated that the Funds were engaged on a course of their own, and bought heavily in Packing stock for their own purposes and to benefit themselves. There was no proof that after the first conversation with Hurley in March, 1969, Deutsch or DuBoff told the Funds when to purchase, how much to purchase, or at what price. The only market activity which was created was created, of necessity, by the presence of bona fide buyers for whose orders stock had to be purchased. Further, the proof showed that the manner in which Deutsch and DuBoff fulfilled the Funds' orders was designed not to raise the price of Packing stock, but rather to prevent such a rise in price.

(*i*) *Motivation for Funds' Purchases*—When the testimony of Fund Manager Hurley produced equivocal proof demonstrating the Funds' motivation, the Government attempted to prove that Deutsch and DuBoff were responsible

* The price at which the Funds purchased rose from $28.50 in March, 1969, to $53. in May, 1969. From May, 1969, to February, 1970, the price fluctuated between $46. and $36.50. After February, 1970, FVF bought a total of 1500 shares at $29.50 on April 14; 1000 shares at $29.50 on April 16; and a total of 500 shares at $25. and $26. on April 22. (Govt. Exh. 49) (1889-92). The consistent purchasing and the drying-up of the available float was, in effect, the determining factor on price.

for the Funds' purchases of Packing stock through the testimony of such non-fund witnesses as Perry Leff and James Ledbetter, Fund Manager for Investment Diversified Services. Leff testified that in early Fall of 1969, Deutsch told him that the reason the price of Packing stock remained level while the market in general was falling was that he, Deutsch, had placed the major portion of the supply with the Denver Funds and other funds, and when no shares were available on the open market, it was not surprising that the price level would be maintained. (Tr., pp. 2410-12) (811-813)

Ledbetter testified that in early 1970, when he told Detusch he felt like selling his Packing stock, Detusch told him this would be a mistake because he knew where every share of the stock was, and that there was a Fund group in Denver which was a consistent buyer of the stock, and any time the stock dipped, or he needed to place stock, he had a place for it in Denver. (Tr., pp. 4447-48)* (1245-46) Ledbetter also testified that in the Spring of 1969, Deane told him that he understood that Packing stock was under control by Deutsch's firm. (Tr., pp. 4472-74) (1253-55)

Hurley himself, however, the supposed victim of Deutsch and DuBoff's scheming, and a co-conspirator, testified that he knew when he was buying Packing stock that the float was small. (Tr., pp. 2108-09) (719-720) In fact, he kept an inventory of his portfolio in terms of the float. (Tr., p. 2096)** (714) He said that he thought at the time that it was to his advantage to buy stock from a small float be-

* However, Ledbetter also testified that in 1968 Deane had advised him to hold the stock, and that thereafter Deane continued to give him encouraging advice about Packing. (Tr., pp. 4462-64) (1250-52).

** James Giasafakis, employed in Financial Program's investment research division, also testified that it was generally known to everyone in the Funds what the approximate float of various companies was, and the number of shares of the companies owned by the Funds. (Tr., p. 3209) (991).

cause he could control the market. (Tr., pp. 2108-09) (719-20)

Hurley also testified that the smaller the float, the more a demand for the stock would cause the price to rise, (Tr., p. 2107); (718) that he realized when it happened that by April, 1970, the Funds controlled 75% of the Packing float (Tr., p. 2215); (753) and that he expected the price of Packing stock to rise when his Fund and the other Funds bought 75% of the float. (Tr., pp. 2219-20)* (757-58) In fact, Hurley testified it was to his interest the price of Packing stock go up because the higher the price, the better the Fund's performance appeared, and the better the Fund's performance, the better money he made and the better ranked his Fund would be. (Tr., pp. 2127-28) (726-27) Finally, Hurley testified that each stock purchased and sold by the Funds was subject to daily, weekly and monthly review. The Board of Directors of Financial Programs also reviewed stocks in the Funds' portfolio quarterly, prior to which Hurley, as Fund Manager, would have to explain and review his portfolio with Financial Programs' President or Director of Investments. (Tr., pp. 2205-21, 2038-39, 2062-65, 2079-85, 2227-28) (743-59; 693-94; 703-06; 706-A712, 760-61). Thus, the testimony out of the supposed victim's, and co-conspirator's own mouth showed that the motivation for the Fund's purchases was its own self-interest, and not Deutsch and DuBoff's scheming.

(*ii*) *Source of Funds' Stock and Manner in which the Funds Purchases were Transacted*—The Funds' purchases were made through Jaffee, who acquired the stock from various brokerage houses including KAB, Naddeo, Allessan-

* Giasafakis also testified in 1970 he had concluded that the Funds were controlling the float of Packing stock (Tr., p. 2488) (861) and he admitted having told the United States Attorney's Office that it was common knowledge that the Funds were controlling the float. (Tr., p. 2490) (862).

drini and New Dimension.* The testimony showed that it was not only extremely legitimate, but also in the interest of the Funds, that Jaffee acquired the stock from those brokerage houses. Hurley himself testified that many individuals followed the nature of the Funds' purchases because they thought if the Funds were interested in a certain stock there was a good likelihood that the price of the stock would go up (Tr., p. 2246 (767), and that he probably told Deutsch to buy carefully so it would not be public knowledge too early that the Funds were heavy buyers of Packing stock. (Tr., p. 2247) (768).

In late April or early May, 1969, Deutsch also told Hurley that if FVF bought Packing stock through Jaffee, Jaffee could furnish the stock at bid price plus commission because

* The only purchase from KAB was the first transaction on March 18, 1969, involving 5000 shares of Packing's new issue at $28. Out of the Funds' 244 purchases of Packing stock through Jaffee, only a little over half, or 148 purchases, involved stock which Jaffee acquired from Naddeo, Allessandrini and New Dimension. (Govt. Exh. 49; (1889). While nowhere mentioned in its Bill of Particulars, the Government sought at trial to prove that Deutsch and DuBoff controlled trading in Packing stock not only through KAB, Naddeo and New Dimension, but also through Allessandrini. The only testimony concerning "directed" trades through Allessandrini antedated purchases by the Funds. In fact, Mrs. Quinn, Shwidock's secretary, who testified to receiving orders from Deutsch and DuBoff concerning trades between KAB and Allessandrini could not remember any occasion on which she spoke to Allessandrini about Packing stock. (Tr., p. 373; (189). The Government also called Louis Chazan, Allessandrini's cashier, to testify that the stock which Jaffee purchased from Naddeo and ultimately sold to the Denver Funds, had been purchased by Naddeo and Allessandrini. Not only was the charge that defendants were responsible for the interim step of a sale between Naddeo and Allessandrini nowhere mentioned in the Information or Bill of Particulars, but also there was no testimony or proof that at the time that Allessandrini sold to Naddeo, Allessandrini knew that Naddeo would resell the stock to Jaffee, or that Jaffee knew that the stock it bought from Naddeo had been bought by Naddeo from Allessandrini. Nor was there any proof that Allessandrini charged Naddeo prices that were any higher than the prices it charged to other brokers for Packing stock.

they knew where the stock was and so would not have to drive up the price by buying the stock piecemeal. (Tr., pp. 1863-64 (624-25).

Hurley knew Jaffee would have to get the stock the Fund ordered from other brokerage firms which made a market in the stock, and Deutsch told him he would be using other firms with which he had a good relationship in order to acquire the stock at the best possible price. (Tr., pp. 2247-28) (768-79). Leonard Mayer, an expert in the securities field (Tr., pp. 4841-45) (1380-84), testified that if a non-market-maker such as Jaffee received a large order from a mutual fund in a stock with a small float, he would generally leave that stock with a market-maker who could accumulate the stock with a market-maker so as not to disturb the market. (Tr., pp. 4876-78) (1413-15). If a firm such as Jaffee wanted to conceal its interest in a stock, the practice would be for that firm to go to an over-the-counter house with which it had a relationship, and to ask that over-the-counter house to act as middle-man without revealing that Jaffee was a buyer. (Tr., p. 4886) (1417). In the absence of a previous relationship between such a firm and over-the-counter house, a buyer would end up paying more for stock because the over-the-counter house would be taking a greater risk. (Tr., pp. 4889-90) (1419-20). The proof as to the actual trades between Jaffee, KAB, Naddeo and New Dimension also showed there was nothing sinister about the way in which Jaffee acquired the stock it sold to the funds.

The only sales of Packing stock to the Denver Funds that Jaffee bought through KAB was Financial Venture's first purchase of 5000 shares of Packing's new issue on March 18, 1969. (Govt. Exh. 49) (1889).

With respect to Naddeo, Mazzeo testified that he had never agreed with Deutsch or DuBoff to do anything illegal with respect to Packing Stock (Tr., p. 3307) (1025), that there was nothing wrong with "directed" trades (Tr., p.

3292) (1412), and that Jaffee was able to keep the price down by going to Naddeo. (Tr., p. 3291) (1011). In fact, the only firm Mazzeo could name to which he was "directed" by Deutsch or DuBoff to purchase Packing stock was KAB, and the only transaction he could recall between Naddeo and KAB was the purchase by Naddeo of 3000 shares on April 4, 1969. (Tr., pp. 3260-64; 3300-02, 3333-41) (995-1000; 1019-21; 1031-39).* Two-thirds of the instances in which New Dimension was the source of the Packing stock purchased by the Funds involved purchases by FVF. There was almost no evidence to link Deutsch or DuBoff to that Fund, see *supra*.

Moreover, by the time New Dimension came into the picture, in the middle of December, 1969, as the source of the stock purchased by the Funds, Deutsch and DuBoff were no longer in direct contact with the Funds except insofar as they executed the Funds' orders. Finally, the majority of shares of Packing stock which New Dimension sold after the middle of December, 1969, were sold short. (Tr., pp. 3679-80) (1120-21). As Leonard Mayer testified, a short sale indicates that the seller is counting on a drop in price, certainly not on a rise in price. (Tr., p. 4862) (1402).

The manner in which Deutsch and DuBoff actually executed the Funds' orders also indicated the reverse of manipulation. For example, on March 18, Jaffee received an order to purchase 20,000 shares at $34. This order was not executed until April 9, with the exception of three trades for a total of 2000 shares, and those trades were made at prices one to three points lower than $34. In fact, Deutsch and DuBoff always bought stock for the Funds at prices lower than the prices at which they were authorized by the Funds to purchase, including the instances when

* Mazzeo also admitted having told the United States Attorney's Office that Deutsch and DuBoff were not directing trades, they mostly bought. (Tr., p. 3277) (1001).

they had the authority to purchase on a market not held basis.* In one case, when they had a 20,000 order available to them on May 7, 1969, on a market not held basis, almost one-half of that order was never executed, and they took until June 9 to fill the other half of that order at prices which remained reasonably close to what the prices were at the starting point of their purchases. (DuBoff Exh. Y) (2177).

(4) *The Funds' Losses*—Through the testimony of Daniel Hesser, an Assistant Vice-President at Financial Programs, the Government chose to prove that in July, 1970, the Funds sold their Packing stock at $1.00 per share, and thus suffered losses of approximately $5,100,000. Hesser was obviously in no position to know or be cross-examined as to the basis for the Funds' decision to sell. In fact, the market in Packing stock on the day the Funds decided to sell was substantially higher than $1.00 per share,** and no reason was even given as to why the Funds chose not to average out their losses by selling the stock piecemeal. In any event, the losses represented an artificially arrived at amount compounded by the Funds' program of acquiring 75% of the float.

C. *Proof Adduced at Trial Outside the Information and Bill of Particulars*

The means specified in the Information and Bill of Particulars by which defendants were alleged to have engaged in stock fraud and manipulation involved simply the causing of purchases and sales by accounts over which they exercised control or had a beneficial interest. At trial, however, apparently deciding to change its theory of the case, the Government introduced a massive amount of evidence concerning alleged misrepresentations by defendants

* "Market not held" meant that no limit was placed on the price at which the stock could have been bought.

** Ledbetter testified that in July, 1970, the market price was $7. or $8. per share. (Tr., pp. 4449-51) (1247-49).

to various purchasers of Packing stock,* and concerning other matters. Not only was this proof totally *dehors* the charges in the Information, but also defendants found themselves constantly in a position of surprise during the course of the trial. Moreover, there was no proof that the alleged misrepresentations were known by Deutsch or DuBoff to have been false, or that any stock was purchased on the basis of these alleged misrepresentations.

1. *Alleged Misrepresentations*

(a) *Means of Disseminating Alleged Misrepresentations*

(1) *Oral Misrepresentations*—The Government sought to prove that defendants had made oral misrepresentations to Michael Papworth, a trainee at Loomis, Sayles & Co.; to Gerald O'Meara, securities analyst with the Value Line Mutual Fund; to Hugh Deane, a broker at Wood Walker; to Joseph Kelly, who became an Executive Vice-President of Packing; to Jack Hurley, portfolio manager of FVF; and to James Giasafakis, who was employed in Financial Program's investment research division.

(2) *Papworth Report*—The Government also sought to prove that misrepresentations by defendants appeared in a report written by Michael Papworth, a trainee at Loomis, Sayles & Co.

Papworth testified that he met with Deutsch in the Fall of 1968, at which time Deutsch discussed various stocks in which Jaffee was involved, including Packing stock. (Tr., pp. 2302-03) (772-73). He subsequently, in March of 1969, met with Cohen, Deutsch and others to discuss Packing in more detail. On the basis of information given

* The Government even sought to prove that these alleged misrepresentations were made to purchasers other than the Denver Funds, even though they chose to confine their charges in the Information and Bill of Particulars to purchases by the Denver Funds.

to him by Deutsch and Cohen,* he prepared a report on Packing dated March, 1969, a report which, he testified, was not an authorized project by Loomis, Sayles, but rather something he had done on his own to get practice in writing reports.** (Tr., pp. 2302-05, 2308, 2312-15; Deutsch Exh. A) (772-776, 779, 783-86; 2191). Nor was there any testimony that writing the report had been suggested by Deutsch or done at his request, or indeed that any money had been paid for the report.

Shortly after Papworth prepared this report, he sent copies to Deutsch and Cohen, both of whom told him they had read it and thought it was good. (Tr., pp. 2308-09) (779-780). Hurley testified that he received the Papworth report from Deutsch in May or June, 1969 (Tr., pp. 1868-69) (627-628).***

(3) *O'Meara Report*—The Government also sought to prove that misrepresentations chargeable to the defendants appeared in a report written by Gerald O'Meara, a securities analyst for the Value Line Mutual Fund. O'Meara testified that after he and Deutsch had established a work-

* However, Papworth testified that he might have gotten the figures in the report concerning the number of franchises sold from Bill Ward, President of Status Marketing.

** Papworth did testify that the report was in his file at Loomis, Sayles, and was read by his superior who did the investing in this particular area. (Tr., pp. 2339-40) (791-92). There was no caveat on the report indicating it was a "practice" report, nor indeed on the covering letter sent with the report to Deutsch on the letterhead of Loomis, Sayles & Co. (Tr., pp. 2336-37; Deutsch Exh. N) (788-89; 2201).

*** The Papworth Report was originally introduced as Deutsch Exhibit A on the second day of trial, when defendants were suddenly presented with Deane's testimony that Deutsch had given him certain financial projections for Packing. At this time, obviously, defendants had no inkling that they would be charged with misrepresentations concerning financial projections, much less with misrepresentations contained in the Papworth Report. The Papworth Report was introduced by Deutsch solely to show that the report embodied what Deutsch told Deane concerning the company's earnings.

ing relationship, Deutsch brought Packing to his attention for possible investment by Value Line. (Tr., pp. 2507-09) (868-70). O'Meara prepared a report dated February 5, 1969, to his superior recommending that Value Line purchase 50,000 unregistered shares of Packing stock. He testified that this report was based on four or five conversations he had with Deutsch between late 1968 and mid-February, 1969. (Tr., pp. 2513-16) (874-877).

This report was not disseminated to anyone who purchased Packing common stock. The report was used internally only.

(4) *Press Releases*—The Government introduced press releases issued by Packing between May, 1969, and April, 1970 (Govt. Exhs. 31A-E; 31-G (1876-1881).

Ronald Frankel, a partner with Bass & Co., who was hired in April, 1969, to do Packing's financial public relations work, testified that Bass had prepared the press releases based upon information received from Cohen and other Packing officers (Tr., p. 4016) (1179). He also testified that he sent copies of these press releases to Cohen, Cohen's counsel, and, in most cases, Deutsch, for their approval (Tr., p. 4016) (1179). The Government introduced several drafts of these releases, some of which bore notations of persons other than the witness, to the effect that approvals had in fact been received from Deutsch.* However, there was no proof that Deutsch had any information concerning Packing's business operations which would have enabled him to correct any misstatements contained in those drafts. Nor was there any testimony about any changes, suggestions or topics relative to these press releases which originated from Deutsch. Indeed, Frankel could not remember any single occasion on which he dis-

* None of the drafts introduced by the Government, however, had been sent to anyone outside Bass, (Tr., p. 4095) (1185), and Frankel said that he could not be positive that he had any documents which had been sent to him by Deutsch indicating Deutsch's approval or disapproval of any items Frankel might have sent to him. (Tr., p. 4062) (1184)

cussed the business operations of Packing with Deutsch. (Tr., 4166) (1194). The only conversation with either Deutsch or DuBoff he could testify to concerned Packing's stock dividend, and this was the type of conversation he would have expected to have with an investment banker. (Tr., pp. 4166-67) (1194-95).

Frankel also testified that none of the defendants ever told Bass who the press releases should be mailed to (Tr., p. 4044) (1183), although Gisafakis testified that the press releases dated July, 1969; August, 1969; October, 1969; and April, 1970 had been received by the Funds. (Tr., pp. 2464-65) (852-53). There was no testimony of what use, if any, was made of the reports by the Funds.

(b) *Content of Alleged Misrepresentations*

(1) *Earnings Projections*—Papworth testified that in the Summer of 1968, Deutsch told him that for the fiscal year ended June 30, 1968, Packing's earnings would be $.17 per share (Tr., p. 779) (305). He testified that at a meeting with Cohen, Deutsch and Deane in March, 1969, he was told that Packing's earnings for the fiscal year ended June 30, 1969, were estimated to be $.35-$.50 per share (Tr., pp. 2302-05; Deutsch Exh. A) (772-776, 2191). O'Meara testified that sometime between late 1968 and mid-February, 1969, Deutsch told him that based on projected plans for 1969, the company expected to earn $3.00 per share that year and to double that figure in 1970. (Tr., pp. 2513-16; Govt. Exh. 2) (874-877; 1747-48).

Deane testified that in the Summer of 1968, after he had told Deutsch he was interested in Packing stock and wanted to find out more about the company, Deutsch gave him earnings projections of $1.00 a share for the fiscal year ended 1969, and projections of $2.50, and $5.00 a share two and three years out (Tr., pp. 570-74, 818-20) (235-39; 310-12), and that Cohen later confirmed these projections (Tr., pp. 574-77) (239-242).

However, the annual reports of Packing showed that for the fiscal year ended June 30, 1968, Packing's earnings were $.18 per share (Govt. Exh. 13A) (1784), for the fiscal year ended June 30,1969—$.05 per share (Govt. Exh. 13A) (1784), and for the fiscal year ended June 30, 1970, $.15 per share (Govt. Exh. 13B).* There was no proof that these projections were not reasonable estimates at the time they were made, based on legitimate hopes for the franchising idea. In fact, Joseph Kally ("Kally") who testified as a Government witness and who had developed substantial experience in the operation of franchise chains in the food business when he was with McDonald's, testified that when he joined Packing in September, 1969, he definitely thought Packing's idea would sell, that the company would be able to find franchisees without much trouble, and that the franchise operations would be profitable (Tr., pp. 2870-72) (940-42).

In addition, both O'Meara and Deane testified that they knew when they received these earnings projections they were based on many variables (Tr., pp. 820, 830-31, 2571) (312, 313-14, 886). In fact, Deane testified that he knew at the time that Status Marketing had not yet been formed, that Status Marketing was the company which was going to sell franchises, and that the earnings projections were based on the assumption that Packing would sell a certain number of franchises, that they would be able to build the franchises, and that the franchises would be financially successful. (Tr., pp. 820, 830-31) (312, 313-14).

Moreover, it was clear that neither O'Meara nor Deane purchased Packing stock on the basis of what they had been

* Brodcorb, Packing's accountant in 1970, testified that if the proceeds from Packing's sale of its meat packing facilities were not taken int[illegible] Packing suffered a net loss of $.06 per share. (Tr., p. 3[illegible] However, he could not attribute Packing's losses to y[illegible] months of 1970, and was unable to state that as of [illegible]ua[illegible], the company was not making a substantial profit. [illegible], pp. 3922-23) (1169-70)

told about the company's earnings projections. Deane testified that he had bought 1000 to 2000 shares of Packing stock for his customers prior to getting these projections from Deutsch. (Tr., p. 712) (288-A). He also began a detailed analysis of these projections in October, 1968, by which time he had his clients buy 4000-5000 shares, and he did not come to the conclusion that these were completely impossible projections. (Tr., pp. 715-20) (289-294). O'Meara testified that his recommendation that Value Line purchase Packing restricted stock was based on his good impressions of Cohen, Deutsch and Ward, President of Status Marketing, and on the fact that Value Line would be investing in a "concept" company, and that earnings were not important in his decision to invest (Tr., pp. 2566-71, 2600) (881-886; 891). Nor is it all evident that Hurley was induced to purchase on the basis of the earnings projections stated in the Papworth Report he received. He testified that he had research people assigned to work specifically with him, that he probably got information from them regarding Packing, and that he used information conveyed by them in helping determine whether he should buy Packing stock. (Tr., pp. 2026, 2036) (688, 692). In addition, he knew by February or March, 1970, that the company was not doing well, because he told Deutsch he felt like selling all of his Packing stock (Tr., pp. 1872-76) (631-35), and yet after that date, he bought a total of 3000 shares (Govt. Exh. 49) (1889-92).

Finally, there was no proof that Deutsch or DuBoff knew anything about the business operations of the company,* and were doing anything more than reflecting the figures they had been told by Cohen.

(2) *Commitment for $20,000,000.* — Hurley testified that in July, 1969, Deutsch told him that there was a union

* Brodcorb, Packing's accountant in 1970, said he had never met Deutsch or DuBoff, or gave them any information with regard to Packing. (Tr., pp. 3921-22) (1168-69)

pension fund, in the amount of $15,000,000.-$20,000,000., which probably would be available to finance construction of the Circus Wagon restaurants. (Tr., p. 1868) (627). Kally and Deane also testified that Deutsch had told them, in November, 1969 and February, 1970, respectively, that he had a $20,000,000. commitment. (Tr., pp. 2686-87, 604-05) (905-06; 257-58).

While Packing never received that amount of money, there was no proof that Packing never received a commitment for that amount of money. In fact, Allen Dudovitz, one of Packing's employees and the Controller and Vice-President of Packing, testified that Cohen had received a letter dated April, 1970, from a Mr. Sirnow, in which Sirnow mentioned a financial commitment for $20,000,000. which he was working on for Packing. (Tr., pp. 4766-67, 4775-76) (1331-32) (1335-36).*

* * *

(3) *Number of Franchises Sold*—Hurley testified that in July, 1969, Deutsch told him that about 100 franchises had been sold and that 100 more were ready to be sold and near to closing. (Tr., p. 1867) (626). Giasafakis also testified that when he went to Packing at Hurley's direction in July, 1969, Deutsch told him that over 200 franchises had been sold. (Tr., pp. 2452-54) (843-45).**

O'Meara testified that sometime between late 1968 and mid-February 1969, Deutsch or Ward told him that the company expected to have at least 150 units operating by the end of 1969. (Tr., pp. 2513-16, Govt. Exh. 2) (874-77; 1747-48). Papworth testified that in March, 1969, either

* Prior to Dudovitz' testimony, he and Cohen had made an unsuccessful search for that letter. (Tr., pp. 4766-67) (1331-32) Orenstein, Cohen's attorney in this case, testified for the record that he had been unable to effect service on Sirnow. (Tr., pp. 4921-24) (1432-36)

** In his oral report to Hurley after this visit, however, he apparently only reported on his impression of Cohen which was a very good impression. (Tr., pp. 2456-57) (846-47)

Deutsch or Ward told him that by June 30, 1969, there should be at least 15 Circus Wagons in operation and a minimum of 30 sold. (Tr., pp. 2302-05, 3242, Deutsch Exh. A) (772-76; 992, 2191). A press release dated May 15, 1969,, stated that commitments for the establishment of 19 Circus Wagon units had already been received from prospective franchisees. (Govt. Exh. 31B) (1877). On October 14, 1969 press release stated that the company had signed agreements to establish 50 Circus Wagon franchises. (Govt. Exh. 31E) (1880). O'Meara also testified that he received a letter from Cohen dated March 17, 1970, which stated as of February 3, 1970, Packing had sold 60 franchises; as of February 19, 100 franchises; and as of March 4, 200 franchises. (Tr., p. 2543; Govt. Exh. 4) (880; 1749).

Finally, Deane testified that in February, 1970, Deutsch told him that 200 franchises had been sold. (Tr., pp. 604-05) (257-58). In an attempt to show the falsity of these statements, the last of which was made in February, 1970, the Government read into evidence Packing's 1970 Annual Report which stated that as of June 30, 1970, Packing had entered into eight licensing agreements which included 27 restaurants. (Tr., p. 3833; Govt. Exh. 13B-1) (1144; 1793) The Government also called Kally to identify a list of franchises as of February 13, 1970, indicating that only 42 units had been sold which Cohen had sent to him. However, even that list, while a complete list of franchisees, was not a complete list of units sold as of that date. (Tr., p. 2786; Cohen Exh. AA) (933; 2154).*

* Kally was also permitted to testify that Cohen was aware of various dissatisfactions and defections on the part of some of the franchisees. (901-904; 917-18, 919; 921-26). (Tr., pp. 2674-77, 2698-99, 2714, 2742-47) However, the defections he testified to did not take place until after February, 1970, the date on which the last alleged misstatement was made, and if some of the franchisees were dissatisfied prior to this time, that was relevant solely to Cohen's exercise of business judgment. In fact, Kally himself testified to the myriad contingencies connected with franchising. (938-39) (Tr., pp. 2841-42)

Dean Richard Faris, Vice President of Marketing at Status Marketing and subsequently a Packing employee under Kally, had some six or seven years' experience in the franchising field prior to going to work for Status Marketing (Tr., p. 4601) (1271), and made regular reports to Cohen and Kally with respect to the number of franchises sold. (Tr., pp. 4605-06) (1272-73). He testified that the way he and other companies he had been involved with counted the number of franchises sold was to count the total amount of the expectation of what he considered the contract, or, in other words, he would include the total number of units a franchisee had the right to elect to put up in the future. (Tr., pp. 4616, 4711) (1279, 1314). There was no format as to the point in time during negotiations when he would tell Cohen that a contract had been made, and that point in time would depend upon "how hard Cohen yelled for information". (Tr., p. 4620) (1283).*

Faris testified that as October, 1969, about 90-95 franchises had been sold. (Tr., p. 4614) (1277). He also testified that the statement in Cohen's letter to O'Meara that as of February 3, 1970, 60 franchises had been sold was an understatement, because he thought 80 had been sold as of that date. He said that Cohen's statement that 100 had been sold as of February 19 was about right, and that, counting the 40 units in New York he told Cohen had been sold in early March, over 200 had been sold as of March 4, 1970.

Brodcorb, Packing's accountant in 1970 and a Government witness, confirmed that prior to a CPA ruling in late 1969, regarding the method of recognizing as income franchise fees, an accepted method of counting the total number of franchises sold was to include the number of units

* Even Kally said that he would consider that a sale had been made if a franchisee gave a good faith deposit indicating his intention to acquire a substantial number of sites, even though the deal might fall through for any number of reasons. (Tr., pp. 2877-78) (943-44)

a franchisee had the right to elect to put up in the future. (Tr., pp. 3917-18)* (1165-66). Not only was it clear that the statements as to the number of franchises reflected a legitimate method of calculation, but also, again, there was no proof that Deutsch was not simply passing on information he had been told by Cohen. Indeed, it would have been to Cohen's advantage to give Deutsch enthusiastic reports in order to maintain his interest in providing financial investment advice.

(4) *Acquisition of F&T Meat Co.*,—The Government tried to prove that defendants also made misrepresentations concerning the acquisition of a meat company. These representations were made not only on the basis of legitimate negotiations, but also at the time that the acquisition was agreed to in principle and never after the time that it fell through because one of the parties wanted to change the terms. Papworth testified that Cohen told him in the Fall of 1968 that Packing had completed acquisition of F&T Meat Company. (Tr., pp. 2302-03) (772-773). He included this fact in his report. (Deutsch Exh. A) (2101). Deane also testified to having been told about F&T Meats, but was told only that Packing was close to (about to reach an agreement. (Tr., p. 834; (315).

The Government called Oscar Feldhamer,** President of F&T Meats, to testify that in 1968 or 1969, Cohen and Deutsch made him an offer to buy his company in exchange for Packing stock, but that he rejected this offer primarily because he wanted cash, and that he never signed any agreement with respect to this offer. (Tr., pp. 2344-50) (794-

* O'Meara himself testified that it was newsworthy in 1970 that there was a question in accounting circles as to the manner of reporting for public companies income derived from the sale of franchises and from franchise operations. (Tr., p. 2581) (887)

** As an indication of the manner in which this trial proceeded, Oscar Feldhamer testified that the first time he talked to the Government was the week before his testimony. (Tr., p. 2356) (801)

800). He did testify, however, that during the talking stage there was an intention to make a deal (Tr., p. 2360) (803), and that his brother may have had other meetings with Deutsch and Cohen (Tr., p. 2358) (802).

The defense called David Feldhamer, Oscar's brother and business associate, who testified that after many conversations with Deutsch and Cohen over a period of several months relative to a possible deal between Packing and F&T Meats, an agreement was finally reached in early 1969. (Tr., pp. 4716-17) (1315-16). He also testified that originally his brother Oscar had wanted to go along with the deal, but then changed his mind because he wanted cash instead of stock. (Tr., pp. 4720, 4723) (1319, 1322).

(5) *Dune Buggies*—The Government went so far as to seek to charge the defendants with misrepresenting the capacities of a dune buggy, even arguing this evidence in summation. (Tr., p. 5194 (1473).

A July 16 press release stated:

> "Today's announcement was made by Milton J. Cohen, President of Richard Packing, who described the company's newest subsidiary as a designer and builder of commercial dune buggies. A dune buggy, he said, is a small, wide-track, peculiar looking automobile especially adept at whizzing through sand and down beaches. These buggies can go anywhere; even if there is no road. . . ." (Govt. Exh. 31C) (1878).

To show that this press release was inaccurate the Government then read from the Papworth Report, a report which the Government had previously argued was replete with misrepresentations, which contained the following statement: "This car is not meant to be driven off the road as a dune buggy." (Deutsch Exh. A) (2191).

2. *Other Proof*

Issuance of 1969 Annual Report—Defendants discovered during the course of the trial that they were also being charged with delaying issuance of Packing's Annual Report for the fiscal year ended June 30, 1969, and with failing to provide that report to certain stockholders once it was issued.

Deane testified that in February, 1970, he told Deutsch his clients were upset because they had not received an anual report. Dutsch told him not to be concerned, that the report was not important. (Tr., pp. 604-05) (257-58). Deane also had six or eight discussions with Cohen about the annual report, beginning in August, 1969. Cohen told him that Packing was changing accountants, and they had not been able to get certain situations evaluated. (Tr., pp. 606-07) (259-60).

* * *

O'Meara testified that beginning in late 1969 and two or three times thereafter, he called Cohen to get financial information. Cohen told him this information would be forthcoming, but he never received the 1969 annual report or any other financial information. (Tr., pp. 2541-43) (878-880). However, Cohen may have told him that one of the things holding up issuance of the annual report was the uncertainty about how the accountants were going to treat income from the sale of franchises. (Tr., p. 2585) (890). Hurley and Giasafakis also testified that they never saw Packing's annual report for the fiscal year ended July 30, 1969. (Tr., pp. 1869; 2460-61) (628; 848-49). Hurley said he asked Deutsch where this report was five or six times beginning in July or August, 1969, and each time Deutsch told him that the report was forthcoming. (Tr., pp. 1869-72) (628-631). However, William Louder, a partner of Lybrand, Ross, the accounting firm engaged to audit Packing for the 1969 annual report, testified that field work for the annual report was not completed until December,

1969, Packing was a new company which had never been audited before, verifying Packing's opening inventory was time-consuming, they had to take inventory for Packing's newly acquired companies which had never been evaluated before, and there were some very complex accounting problems which had to be resolved, including calculating the income received from the franchises. (Tr., pp. 4796-97, 4800-02) (1351-52, 1353-55).*

Louder testified that even after the field work was completed, it took time for the accountants to evaluate their notes and bring them up to date. (Tr., pp. 4804-05 (1357-58). He also testified that Cohen had asked him from time to time when the audit would get done. (Tr., pp. 4817-18) (1362-63).**

The Government introduced a letter dated March 17, 1970 from Cohen to Bass & Co., who prepared the 1969 annual report to stockholders from its own office, in which Cohen said that he did not wish the report to be distributed to any media. (Govt. Exh. 84) (2020).

Gloria Jean Segal, Cohen's secretary, testified that the annual report was sent by Bass to Packing's office in the Spring of 1970, that she had been instructed to mail those reports out immediately, that she applied stickers she had received from Packing's transfer agent, Northwestern

---

* Deane knew that Packing was having difficulty reconciling the opinions of different accountants, and that the accountants were still working on the report after April, 1970. (Tr., pp. 748-51) (298-301)

** Brodcorb, Packing's accountant who prepared the 1970 annual report, also testified that there was a necessary lag after the close of a fiscal year before an annual report could be issued, (Tr., p. 3905) (1157) and that there had been changes instituted by the accounting industry in the Fall of 1969 as to the manner of recognizing franchise income. (Tr., pp. 3911-12) (1159-60) He said that since the accompanying notes which were part of the 1969 annual report's financial statement were only completed as of March 20, 1970, the report would not have been available until after that date. (Tr., p. 3905) (1157)

Bank, which contained names and addresses of Packing shareholders, as well as addressed copies from her own list of persons who had called to request the report, and that, through a great deal of work, the reports went out the same day they came in. (Tr., pp. 4579-81) (1265-67).

The Government called as a rebuttal witness Hugh Clayton, a Packing sh: reholder, to testify that he had not received a copy of the annual report until July, 1970. However, he received a number of 1969 reports at different addresses, because he owned stock in a number of different names. (Tr., pp. 4960-61) (1445-46). While the envelope in which, he testified, he received the report for the first time was postmarked July, 1970 (Govt. Exh. 89) (2036), Mrs. Segal, who said she had sent out the reports in the Spring, said she had never seen an envelope such as the one saved by Clayton. (Tr., pp. 4589-90) (1268, 69). In addition, Deane even testified that he had received the 1969 annual report in April, 1970. (Tr., pp. 608, 754) (261, 302).

POINT I

The proof at trial deviated substantially from the charges contained in the information.

* * * *

A substantial portion of the Government's proof at trial differed remarkably from the evidence presented to the Grand Jury and the charges contained in the Information.

The Information charged that "commencing on or about March, 1969, Bernard Deutsch and Stanley DuBoff, the defendants, for the purpose of causing the price of Packing common stock to rise in the open market, *induced certain mutual funds* in Denver, Colorado, namely Financial Venture Fund, Financial Dynamics Fund, and Financial Industrial Fund *to purchase Richard Packing common stock*, through Jaffee & Company, a registered broker dealer,

where they were registered representatives, *from accounts over which they exercised control or in which they had a beneficial interest . . .*" . (emphasis added). At trial, however, the Government introduced a plethora of evidence to show that the funds were induced to purchase by false and misleading representations as to Packing's business operations. Thus, the Government, having specified in the Information the way in which the manipulation was accomplished, chose to prove a totally different way at trial. The defense was simply unprepared to meet these new charges.*

Further, the Government sought to prove these new charges by evidence which, by piling inference upon inference, became totally unrelated to the basic charge in the Information, that defendants manipulated the price of Packing stock. Defendants were left with no idea, from one day to the next, of the charges they would be expected to defend against.

For example, the Government, at trial, charged that defendants had misrepresented the number of franchises which had been sold by Packing. The Government then sought to prove that the numbers represented by defendants were overstated by introducing proof that many of the franchises contracted for never came to fruition. Clearly Packing's difficulty in keeping its franchisees satisfied, for any number of reasons relating largely to business conditions, was far afield from any issue involving manipulation of the price of Packing stock.

The Government also introduced proof concerning misrepresentations to persons who were not even purchasers of Packing common stock. The Government called O'Meara, for example, to testify that defendants gave him false information which was the basis of a report he wrote recommending that Value Line purchase 50,000 unregistered shares of

* The only misrepresentations mentioned in the Information were the alleged false representations in Packing's Offering Circular, which were of a totally different nature.

Packing stock. Not only was there no indication that this report was put into the hands of the investing public, but also the shares purchased by Value Line were unregistered shares which could have had no effect on the market *per se*, and this private placement was never used as a selling tool by any of the defendants or Packing.

Other proof introduced by the Government at trial was likwise far afield of the special charges in the Information. The Government charged and specified in its Bill of Particulars that one of the controlled accounts from which defendants induced the Fund to purchase was New Dimension. The only Fund to purchase through New Dimension was the Financial Industrial Fund, and there was no testimony that any of the defendants had anything to do with that Fund's decision to purchase Packing stock. Even assuming such a connection had been proved, the only issue was whether defendants in fact controlled the trading by New Dimension in Packing stock. Yet the Government introduced a mass of evidence to show that New Dimension was set up for the purpose of concealing Deutsch and DuBoff's principal interest in that firm. Even after substantial testimony was elicited to establish that Deutsch and DuBoff had a voice in New Dimension's operations, the Government introduced an interior decorator's worksheets and proposals for the townhouse which New Dimension planned to occupy and which Deutsch and DuBoff eventually purchased, to show the nature and expense of the furnishings there. This evidence, appellant submits, had nothing to do with the charges in this case, and would only have served to unnecessarily prejudice defendants in the eyes of the jury.

The Government also called the cashier of Allessandrini & Co. to testify that the stock which Jaffee purchased from Naddeo and ultimately sold to the Denver Funds, had been purchased by Naddeo from Allessandrini and thus sold to the Funds at a price reflecting these other firms' profits.

Not only was the charge that defendants were responsible for the interim step of a sale between Naddeo and Allessandrini nowhere mentioned in the information or Bills of Particulars, but also the definition of manipulation is creation of market activity for the purpose of inducing others to purchase, not for the purpose of filling customers' orders.

In addition to the fact that much of the evidence introduced by the Government at trial was *dehors* the Information and Bills of Particulars, it is evident from examination of at least the Government's 3500 material that most of this evidence was not even presented to the Grand Jury. Indeed, one witness, Oscar Feldhamer, who was called by the Government to prove that defendants misrepresented acquisition of his meat company, testified that the first time he had been contacted by the Government was one week before he testified in the third week of that. (Tr., p. 2356) (801).

Appellant contends that this variance between the charges in the Information and the evidence introduced at trial was fatal, causing defendants constant surprise during the course of the trial and obvious difficulty in preparing a defense.*

It is a basic proposition of our criminal justice system that an indictment is defective if it fails to apprise the accused with reasonable certainty of the charges which will be made against him at trial. *United States* v. *Simmons*, 96 U.S. 360, 362, 24 L.Ed. 819 (1877); *United States* v.

* The Assistant U.S. Attorney, to counter defendants' objections of surprise, constantly asserted that defendants could not have been surprised because all of the documents pertaining to the trial had been available for inspection in his office for a period of weeks. It simply boggles the mind to expect that defendants would prepare to defend themselves against a misleading press release, for example, because that press release was one of the thousands of documents stuffed into three file cabinets in Mr. Feffer's office, even though misrepresentations, let along press releases, were nowhere mentioned in the Information or Bills of Particulars.

Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1875); *Russell* v. *United States*, 369 U.S. 749, 8 L.Ed. 240, S.Ct. 1038 (1962); *United States* v. *Lamont*, 18 FRD 27 (SDNY 1955), *aff'd.* 236 F. 2d 312 (2 Cir. 1956). As the Court recently stated in *United States* v. *Zeehandelaar*, 498 F. 2d 352, 356 (2 Cir., 1974) (Lumbard, J.):

> "An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant questions of fact and law, that the trial court will be able to determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy. *See, generally*, Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962)."

In the instant case, it is clear that appellant has been tried and convicted for offenses other than those for which he was indicted by the Grand Jury.

While the Information contains the catch-all phrase "among other things", this phrase cannot cure the variance between the charges in the Indictment and the proof adduced at trial. As the Court stated in *United States* v. *Pope*, 189 F. Supp. 12, 26 (SDNY 1960):

> "But the vice goes beyond mere failure to inform. The Grand Jury, under the Constitution, is the accusatory body in felony offenses. To permit the allegation to remain would constitute an impermissible delegation of authority to the prosecution to enlarge the charges contained in the indictment.

> "A specific charge made by the Grand Jury may itself fail for lack of proof and yet, if the prosecution may augment the charges under the all-inclusive 'among other things', the defendants may finally be prosecuted and convicted on charges of falsity in the statements not considered by the Grand Jury, or, if considered, may have been rejected by it.
>
> "A bill of particulars by adding specifications of false and misleading statements under the phrase 'among other things' would enable the prosecution to 'guess at what was in the grand jury's mind'." (At p. 26)

See also *United States* v. *Silverman*, 430 F. 2d 106 (2 Cir., 1970); *United States* v. *Caine*, 441 F. 2d 454 (2 Cir. 1971).

Clearly, the requirement of specificity of indictment does not foreclose receipt in evidence of matter relevant to the issues. However, such "relevant" matter cannot be simply a euphemism for deviation from the theory and evidence upon which the Grand Jury returned its indictment.

> "The policy underlying the requirement of specificity in the indictment is similar to that which forbids the amendment of an indictment without resubmission to a grand jury. It is to prevent the usurpation of power by the court and prosecutor in allowing a defendant to be convicted 'on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.' Russell v. United States, 369 U.S. 749, 770, 82 S. Ct. 1038, 1050 (1962). This policy is effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based. See generally, 8 Moore, Federal Practice § 7.05[3] *United States* v. *Silverman*, supra, at 110.

All of the evils expressed by this Court in the case cited are present in this case. On this ground alone, appellant's conviction warrants reversal.

POINT II

The Court's charge on reliance was plain error; the Court's charge on "normal profit" was misleading.

Reliance Charge

The Court's instruction to the jury on reliance was plain, reversible error. Not only did that particular charge exceed the most recent dictates of the courts on the subject of reliance in civil cases, but also it foreclosed to appellant a critical and valid defense.

In fact, the Court's charge was totally unwarranted by the cases cited by the Government in support of its Request to Charge. (Request to Charge No. 27: "Reliance on the Misrepresentations Not Required"). In order to establish a precedent for the requested charge, the Government cited three completely inapposite cases, *N. Sims Organ & Co.* v. *Securities & Exchange Commission.* 293 F. 2d 78, 80n (2 Cir. 1961); *Hughes* v. *Securities & Exchange Commission.* 174 F. 2d 969, 973-74 (D.C. Cir. 1949); and *United States* v. *Brown*, 79 F. 2d 321, 324 (2 Cir. 1935). The reference to *United States* v. *Brown, supra*, contains Judge Learned Hand's sober reaction to the prosecutor's excessive use of lengthy and heart-rending testimony by the unfortunate purchasers of stock. Purely in *dictum*, the Judge found the testimony of the purchasers, also victimized by the great depression, to be irrelevant, as the prosecution need not, under the securities laws, prove damage. The error was not so prejudicial, however, as to require reversal of conviction, and as the Court more recently stated in *United States* v. *Dardi*, 330 F. 2d 316, 332 (2 Cir. 1964) *cert. den.* 379 U.S. 845 (1965), *reh.* den. 379 U.S. 986 (1965):

> ". . . there is no merit in the contention that appellants were prejudiced by the testimony of the unfortunate purchasers of [the] stock. Such testimony was relevant to numerous counts of the indictment." (for stock fraud)

It stands only for the proposition that the Government need not positively demonstrate harm to purchasers in order to secure a conviction for violation of the securities laws. With this contention, appellant agrees. However, to conclude inversely that proof of non-harm would also be irrelevant is erroneous.

The other cases cited by the Government (*Sims* and *Hughes*, *supra*) are appeals from proceedings instituted by the Securities and Exchange Commission for revocation of broker-dealer licenses. These are not true criminal actions but private proceedings. As the Second Circuit has stated in *Hanly* v. *Securities & Exchange Commission*, 415 F. 2d 589 (2 Cir. 1969), at 596, in a license revocation or injunctive proceeding, the standards of reliance of purchasers and specific intent to defraud of defendants are inoperative.

In response to the Government's request, the Court charged the jury that it was not necessary for the Government to establish that anyone relied upon defendants' alleged misstatements or omissions of material facts:

> "First, by statements of material facts that are just not true and, second, by the omission from what is said of material facts which are necessary to make what is said truthful.
>
> "In other words, once having undertaken to state a fact or facts, there is an obligation on the one who does so not to give such a distorted picture of them as to make the statement misleading concerning what the actual facts really are. A half truth may be a misrepresentation and fradulent misrepresentations may be affected by half truths if they are calculated or intended to mislead. Having chosen to speak, there is an obligation to state all the facts which are necessary to a proper understanding of the particular subject matter which is being covered.

A statement although literally true is nevertheless false if when interpreted in the light of the effect it would produce on the minds of those whom it was calculated to influence, it would create a false impression of the true state of affairs.

"Of course, such facts whether affirmative false statement or omissions of facts necessary to portray a true picture of what the facts really are must be material. By 'material' I mean simply facts which could reasonably be expected to induce a person to decide whether to act or not act and, in this case, to purchase or not to purchase stock of Richard Packing Company. Material facts include those which affect the possible future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities.

"It is not necessary for the government to establish that anyone relied on or suffered damage as a consequence of any false statements or omissions of material facts. It is enough that false statements or statements omitting material facts should be made in the expectation that they would be relied upon." (Tr., pp. 5306-08) (1583-85).

* * *

Objection was timely made. (Tr., p. 5349) (1627).

This charge was erroneous in that it permitted the jury to disregard totally the element of reliance, an element crucial to any finding as to defendants' criminal intent.

In civil suits involving violations of the securities laws, the courts have refused to eliminate the element of reliance. In non-disclosure cases, where it is close to impossible to demonstrate reliance on something never revealed, reliance still has some relevance. *Securities & Exchange Commission* v. *Shapiro*, 349 F. Supp. 46, 54 (SDNY 1972) *aff'd.*

494 F. 2d 1301 (2 Cir. 1974). In civil misrepresentation cases, the courts have tended to create a presumption of reliance. As the Court stated in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F. 2d 341, 374-75 (2 Cir. 1973; *cert. den.* 414 U.S. 910 (1974):

> "Where the transaction is accomplished through impersonal dealings, such as on a stock exchange, or for some other reason the factors that influenced the parties are not readily apparent, the decisions have discussed liability in terms of the 'materialty' of the misprepresentations.
>
> * * *
>
> "[I]mpracticalities are avoided by establishing a presumption of reliance where it is logical to presume that reliance in fact existed."

However, such a presumption is rebuttable, and may be negated by a showing of factors such as business expertise and experience. See *Sandor* v. *Ruffer, Ballan & Co.*, 309 F. Supp. 849 (SDNY 1970; *Jackson* v. *Oppenheim*, CCH Fed. Sec. L. Rep., §93,008 at 90, 716-17 (SDNY 1971).

In this case, even applying the civil law standard, any presumption of reliance was negated by substantial evidence introduced by defendants concerning the business sophistication and independent judgment of the mutual fund managers as well as specific disclaimers by various witnesses that they relied upon financial projections and other information in buying Packing stock.

If reliance is still a factor in civil cases, it is critical in criminal cases where a defendant's criminal intent is at issue. This has been recognized in mail fraud cases. As the Court stated in *Linden* v. *United States*, 254 F. 2d 560, 566 (4 Cir. 1958):

> "While it is true that the success of a scheme is not a necessary element of the crime defined in the

mail fraud statute, nevertheless where, as here, the indictment charges the defendant with making captious, deceptive and misleading solicitations, the effect of the solicitations upon the recipients is a highly pertinent fact in determining whether the solicitations are of the nature charged. Cf. Silverman v. U.S., 213 F. 2d 405 (5 Cir. 1954); Haid v. U.S. 9 Cir. 1946, 157 F. 2d 630, 632. The tendency of the form to mislead is shown by testimony that it did mislead.

"Moreover, to sustain a conviction, the intent of the defendant in devising the scheme must be to deceive and defraud, and the end was relevant to establish this intent. Cf. Aiken v. U.S., 4 Cir. 1939, 108 F. 2d 182, 183; Rice v. U.S., 10 Cir. 1945, 149 F. 2d 601, 603. . . . The known misleading tendency of a scheme is indicative of the defendant's criminal intent, and the trier of facts may reasonably in such circumstances apply the presumption founded upon common experience and recognized in law, that a person intends the consequences of his acts."

Because fradulent intent is an abstact, intangible quality, the jury is entitled to hear and consider as much evidence as is available which bears upon a guilty state of mind or lack thereof. However, the Court's charge on reliance, coupled with its charge on the permissible expansive use of circumstantial evidence to infer intent, would lead the jury to believe that reliance was irrelevant to defendants' criminal intent. Thus, the jury was permitted to draw an inference of guilt from the totality of circumstances, while it was foreclosed from drawing an equally plausible inference of innocence by the manner in which a trial judge could instruct a jury:

"This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as

> not to mislead and especially that it should not be one-sided;' that 'deductions and theories not warranted by the evidence should be studiously avoided.' "

Appellant duly objected (Tr., pp. 5345-46) (1623-24) to the use of the words "normal profit" in connection with profits made in New Dimension. This was a decided deviation from the proof at trial, and, it is urged, a misinterpretation of the law. First, it would appear that the term "normal profit" is misleading. Next, it is prejudicial to use such a term in a trial where none of the sums mentioned might appear "normal" to a lay jury. Finally, the Judge's statement clearly tended to establish for the jury the fact that there is criminal impropriety in earning large profits.

In summary, the cumulative effect of many less-than-grievous errors is often greater than the sum of its parts. In *United States* v. *Guglielmini*, 384 F. 2d 602 (2 Cir. 1967), the Second Circuit found that, while individual errors standing alone were not sufficiently harmful as to be reversible, the total atmosphere created by errors consisting of the trial judge's statements served to demean defense plausible inference of innocence.

If reliance is an important factor in determining deceptiveness and intent to defraud, the absence of reliance cannot be less pertinent. In eliminating this factor from the jury's consideration, the Court committed plain error.

"Normal Profit" Charge

In addition, the Court erred in failing to properly instruct the jury with regard to its guidelines in evaluating the profit realized in the case.

The Court charged (Tr., p. 5299) (1576):

> "You have heard testimony with respect to an alleged indirect interest or control exercised by the defend-

ants Deutsch and L. Boff in New Dimension Securities Corporation. The question of the propriety of any such interest or control is not before you and should not be considered by you.

"The evidence was admitted primarily to establish that by the use of that alleged control of interest, defendants manipulated the price of the stock of Richard Packing. If you find that New Dimension Securities Corporation did nothing more than execute orders received from Jaffee & Company on which a normal profit was made and that the defendants did not conspire to raise or maintain the price of the stock, then you are to ignore all the evidence with respect to their relationship with New Dimension Securities Corporation."

In *Quercia* v. *United States*, 51 S.Ct. 698, 699 (1933), the Supreme Court set forth the following boundaries counsel and cast an unfavorable light on the defense, the admission of irrelevant prejudicial evidence was so prejudicial to the defendant as to necessitate reversal of his conviction. Appellant Deutsch contends the situation which prevailed at the trial of *United States* v. *Cohen, et al.* falls squarely within the pertinent facts of the *Guglielmini* case, *supra.* Appellant respectfully urges the Court that the same remedy is appropriate. Only a reversal of conviction will preserve appellant's right to a fair trial.*

---

* The confusion engendered by the total charge is capsulated in the request that was made by the jury in the course of its deliberations (Court Exh. 10) which stated:

"Your Honor, if a count consists of several points (i.e. A,B,C, or 1,2,3, etc.), and we reach a verdict on one point, is the charge that: The entire count is found accordingly? Miss Short"

See, Tr., pp. 5388-5401. (1664-1677)

POINT III

The testimony of the Government's expert witness was inadmissible.

The Government called Mrs. Ruth Appleton, an attorney with the Securities and Exchange Commission, to testify as an expert that, in her opinion, the alleged misstatements and nondisclosures in Packing's Offering Circular were material, and KAB acted as underwriter in the public offering. Admission of this testimony concerning both ultimate facts and questions of mixed law and fact was plain error.*

To allow Mrs. Appleton to offer her opinion that the misstatements and nondisclosures were material was to usurp the jury's role in determining an ultimate issue of fact.**

Materiality is clearly not a subject on which an expert can aid the jury. As the Court recently stated in *Securities & Exchange Commission* v. *Shapiro*, 349 F. Supp. 46, 54 (SDNY 1972):

> "A major factor in determining whether events are material is the importance attached to the events by those who knew about them."

Moreover, the materiality of misrepresentations and nondisclosures lies at the heart of the charges in a prosecution for securities law violations. It is clear that an expert witness may give his opinion on questions of fact. However, such a witness should not be allowed to offer his opinion on questions of "ultimate" fact, e.g. *Garza* v. *Indiana & Michigan Electric Company*, 338 F. 2d 623, 626 (6 Cir. 1964); *Rebmann* v. *Canning*, 390 F. 2d 71, 74 (3 Cir.

---

* Objections to the entire testimony were made. (Tr., pp. 1637-38, 1651-52, 1666-70, 1691). (519-20; 531-32; 546-50; 565).

** See Tr., pp. 1659, 1679-81, 1684, 1685, 1687-88, 1689-90, 1691. (539; 556-58; 559, 560, 561-62, 563-64, 565)

1968); *Strauch* v. *Hirschman*, 40 AD 2d 711, 336 NYS 2d 678 (1972); *Vispetto* v. *Bassuk*, 41 AD 2d 958, 343 NYS 2d 988 (1973). While the Second Circuit has indicated some reluctance to adopt this "ultimate fact" distinction in civil cases, the Sixth Amendment compels more stringent requirements regarding the admissibility of expert opinion evidence in criminal cases. *United States* v. *Williams*, 431 F. 2d 1168 (5 Cir. 1970) *cert. den.* 405 U.S. 954 (1972), *reh. den.* 405 U.S. 1048 (1972).*

In addition to her testimony concerning materiality, Mrs. Appleton was permitted to offer her opinion as to the meaning of an underwriter and to testify that, in her opinion, KAB acted as underwriter in Packing's public offering.** Admission of this testimony was also plain error.

---

* Indeed, this Court itself appears to have recognized the necessity of the "ultimate fact" distinction.

In *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2 Cir. 1970), *reh. den.* 397 U.S. 978 (1970), the Court held that expert testimony regarding appellant's responsibility for libel was admissible based on judicial precedent, the jury's need for technical assistance, and the fact that the expert witness was not asked to, nor did he, express his conclusion as to whether appellants were reckless in conducting their poll. The expert witness discredited appellants' polling methods by comparing them with good polling practices, but the "ultimate issue" of whether there was knowing or reckless falsity was left for the jury to decide.

** Mrs. Appleton testified that "an underwriter can be anyone who is engaged to sell the securities of the company that is making the offering or anyone who purchases the securities of a company with a view to reselling it to the public, or it can be anyone who is directly or indirectly participating in the offering." (Tr., p. 1610) (507) She also gave the following answer to the following question:

> "Q: I'd like you to assume, Mrs. Appleton, that 10,000 shares are issued in a Regulation A. I would like to have you assume that all 10,000 shares are handled by a brokerage firm; 2,000 of those shares are going into the brokerage firm's firm trading account; 5000 of those shares are being sold for commissions, and the final 3,000 are being sold to customers for commissions. I would first like to ask you, in your opinion, would that brokerage firm be an underwriter? A: Yes." (Tr., pp. 1736-37) (578-79)

While knowledge of the securities laws is not within the common experience of a lay jury, Mrs. Appleton, as a Government attorney in an agency responsible for enforcement of the securities laws, was inherently in a position to exert undue influence upon the jury. It is altogether unreasonable to expect that a lay jury, even with the benefit of cautionary instructions regarding the non-binding effect of expert testimony, could possess any sort of yardstick by which to evaluate the validity of the legal opinions rendered by Mrs. Appleton.* Whether KAB acted as underwriter was a question for the jury to determine on the basis of the Government's proof of the facts and the Court's instructions of the law.

In sum, in admitting Mrs. Appleton's testimony relating to these questions of ultimate fact and of mixed law and fact, the Court committed prejudicial error.

POINT IV

Appellant was denied a fair trial by the Court's misapplications of the doctrine of "opening the door".

Appellant was denied a fair trial by the Court's repeated misapplications of the doctrine of "opening the door". As a result of the wide and unwarranted latitude permitted the Government on re-direct examination, appellant's cross examination was substantially inhibited.

The Second Circuit has clearly and repeatedly explained the limitations of "opening the door", see, e.g. *Grobelny* v. *W. T. Cowan, Inc.*, 151 F. 2d 810 (2 Cir. 1945); *United States* v. *Corrigan*, 168 F. 2d 641 (2 Cir. 1948); *United States* v. *Dennis*, 183 F. 2d 201 (2 Cir. 1950), *aff'd.* 341 U.S. 494 (1951). In *Corrigan*, the court reversed defendant's conviction on the ground that the prosecution had

* Indeed, allowing an S.E.C. attorney to testify that, in her opinion, KAB acted as underwriter was tantamount to allowing the United States Attorney to offer his opinion as to the defendants' guilt.

introduced incompetent and prejudicial evidence based upon a misinterpretation of its prerogatives after the defense's expansive cross-examination. The Court reasoned:

> "The doctrine of 'opening the door' is an application of the principle of 'completeness', that is, if one party to a litigation puts in evidence part of a document, or a correspondent or a conversation which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondent or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary . . .
>
> "The effect of 'opening the door' has been well and tersely defined in Hayden v. Houdley, 94 Vt. 345, 49, 111 A. 343, 345: '[The rule] is protective, merely. It goes only so far as is necessary to shield a party from adverse inferences, and only allows an explanation or rebuttal of the evidence received."

In the instant case, the Government was permitted a latitude in its redirect examination which went far beyond explanation or rebuttal of the evidence received. For example, at Tr. pp. 1147-48 (402-03), appellant's counsel sought to impeach Shwidock's testimony by reading from an indictment charging Shwidock with criminal activity in connection with a public offering by Status Marketing. Counsel read from the indictment, without mentioning Status Marketing, simply to elicit the fact that Shwidock had pleaded guilty and the nature of the charges which induced his guilty plea. On redirect (Tr., pp. 1560-79, 1603-09) (475-94, 499-506), the Government was permitted to introduce evidence that KAB had been named as underwriter in the Status Marketing prospectus, even though the indictment itself mentioned nothing about an underwriting, on the theory that appellant had opened the door to anything relating to the entire Status Marketing case which bore

some relevance to the instant case (Tr., p. 1574) (489). This evidence did not in any way serve to rebut the defense's use of the indictment to impugn Shwidock's credibility, but rather opened up a new substantive area of proof against defendants. Appellant submits that to allow general inquiry on a subject matter only touched upon on cross examination was plain error.

Again, during cross examination of Rothman at Tr. p. 3510 (1072), Rothman volunteered, without being asked, that when he worked at New Dimension he answered the telephone 25% of the time. The Court held that this purely gratuitous remark opened the door to general inquiry by the Government on redirect concerning all of the stocks besides Packing stock which New Dimension traded. (Tr., p. 3755) (1134).

At Tr. 1029-30 (361-62), the Court held that counsel's *voir dire* examination of KAB's cash receipt and disbursement books, which dealt not with entries but with the lack of chain of custody, opened the door to the Government's impeachment of its own witness in eliciting that Shwidock had charged off his personal expenses at KAB business expenses. At Tr. 2915 (949), counsel brought out on cross examination of Kally that Kally had spoken to a franchisee, Mr. Christina, about a letter of commitment for financing received by Packing. The Court held that this questioning allowed the Government to introduce in evidence a letter from Kally to Cohen, not to Christina, which mentioned not only the letter of commitment but dissatisfaction on the part of the franchisees. (Tr. 2930-33) (950-953).

On *voir dire* examination of Malmon at Tr. 111-12 (131-32) Malmon was asked about a specific meeting of Packing's Board of Directors for which he had composed minutes authorizing issuance of certain stock options:

> "Q. Did you compose those minutes, then, as a result of any meeting that was actually held? A.

No, sir, there never was any meeting of the board of directors with respect to this."

The Court, at Tr. 149 (145), held that this question and answer with respect to one specific of the board of directors opened the door for the Government to elicit that Malmon had on several occasions advised Cohen of the desirability of holding shareholders' meetings but that Cohen declined to hold such meetings.

Brodcorb, Packing's accountant, testified on direct that Packing had suffered certain losses as of June 30, 1969. On cross examination, one defense counsel inquired as to the specific months in which these losses occurred (Tr., 3922) (1169), and another asked Brodcorb if he was familiar with a change in accounting rules with respect to the way franchise agreements were counted (Tr. 3911) (1159). Neither questioning suggested that the change in accounting rules was a basis for Packing's losses. However, the Court held that the defense had opened the door to the open-ended inquiry of "... what else was Richard Packing's loss attributable to, other than the change in accounting procedure that you spoke of?" (Tr., 3926-28) (1171-73). In many instances, questions of a witness on cross-examination were held to open the door to general inquiry on the subject of a totally different witness. For example, Shwidock was cross-examined, and answered primarily in the negative, concerning his own relationship in 1970 with various persons connected with the Reiss Bank (Tr. 1405-23) (426-443). On the basis of these questions, the Government was permitted to offer affirmative proof not only through Hurley but also through Leff, whom the Government admitted it would reconsider putting on the stand but for a relationship with the Reiss Bank in regard to a deal which had nothing to do with the instant case (Tr., 1876-93, 2404-10) (635-52, 805-11). Thus, defense counsel's

cross-examination of a witness to cast doubt on his credibility authorized the Government to introduce collateral evidence of another unrelated act of Deutsch which the jury was permitted to consider in its deliberations.

At Tr. 1006 (359), the Court held that cross-examination of Mrs. Quinn concerning other stock besides Packing stock which Deutsch and DuBoff had directed her to trade opened the door to the Government's introduction of evidence that KAB had paid the Reiss Bank a total of $90,000. which, the jury could infer constituted kickbacks for trading in other stocks besides Packing stock.

There are other instances in which areas which were covered of necessity on cross-examination were held to open up a topic to general testimony. Defense counsel asked various questions of Malmon, so that the jury could understand his testimony, for example, asking him to define restricted stock after he had testified on that subject. Largely because of these questions, the Court permitted the Government to in effect contradict its own witness by calling another witness, Mrs. Appleton, to testify as an expert on the securities laws. (Tr. 1662-92) (542-566). Moreover, if this were not enough, the Government was then permitted to ask Mrs. Appleton on redirect her opinion on facts outside the facts of the instant case simply because counsel raised certain assumptions on cross-examination in order to challenge her assumptions permitted over objection on direct. (Tr., 1781-82) (588-89).

Finally, in several instances the Court inhibited legitimate cross-examination by indicating prior to such examination that he would be prepared to find doors opened if defense counsel inquired into certain areas. In its direct examination of Hurley, the Government introduced, over objection, facts from which it would argue that Deutsch and DuBoff owned New Dimension. At Tr. 1965 (678), the Court indicated, in effect, that any cross-examination on

this issue would open the door to such matters as a post-conspiratorial statement by DuBoff which could be construed as an admission of control over New Dimension. Again, at Tr. 2159-62 (730-33), defense counsel proposed to cross-examine Hurley based on a telephone conversation between Hurley and Deutsch, to elicit the fact that the Funds sold their stock for other than business reasons. The Court stated that this examination would permit the Government to come back and inquire not simply whether Hurley had made that statement on the basis of his own knowledge, but as to the entire telephone conversation relating to totally extraneous matters.

Only a full reading of the trial transcript could convey the flavor of the Court's erroneous interpretation of the "opening the door" doctrine. In sum, the Government was permitted to inquire generally both on redirect and of totally different witnesses, on subject matters touched upon specifically during cross-examination by defense counsel, but otherwise immaterial to the specific charges in the Information.

As a result, not only was the prosecution permitted to introduce incompetent and prejudicial evidence, but also the defense may have avoided areas on cross-examination which would have brought out exculpatory material. As the Supreme Court noted in *Alford* v. *United States*, 282 U.S. 687, 688, 75 L. Ed. 629, 51 S. Ct. 240 (1931):

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory... Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them (citations omitted). To say that prejudice can be established only by showing that the cross-examination,

if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

In this case, appellant was clearly prejudiced by the Court's misapplication of the "opening the door" doctrine and inhibited in the kind of legitimate cross-examination which is essential to a fair trial, see *United States* v. *Masino*, 275 F. 2d 129 (2 Cir. 1960); *Alford* v. *United States*, *supra*.

POINT V

Appellant was denied a fair trial by the Court's appearance of partisanship and interjections.

The Court made statements in open court in the course of this trial, which conveyed judicial bias. In addition, the Court frequently interrupted the testimony of witnesses with questions obviously designed to assist in presenting the witness' testimony in a light most favorable to the Government. This prejudicial error denied appellant a fair trial.

Only a full reading of the trial transcript could convey the courtroom atmosphere in which appellant sought to defend himself. One of the most glaring examples of the Court's prejudicial statements in open court occurred at Tr., p. 3863 (1147), during the direct examination of Brodkorb, Packing's accountant. Appellant's counsel objected to a question and the Court replied as follows:

"Mr. Segal: Subject to connection.

"Court: No, I am not so sure about Mr. Deutsch. I have been reviewing this case at considerable length . . .

"Mr. Segal: I object to this discussion in front of the jury, your Honor.

"Court: All right subject to connection as to Mr. Deutsch."

For the Court to suggest in front of the jury that it had already found sufficient evidence to link appellant to the alleged conspiracy could only have served to prejudice appellant in the eyes of the jury.

Other examples of the Court's bias occured. At Tr., pp. 3864-65 (1148-49), the Court stated:

> Mr. Robson: I object unless it is within the terms of this indictment and has something to do with this case.
>
> The Court: Why don't you take the positive side of it?
>
> Mr. Robson: I object to your Honor assisting the prosecutor and presenting the evidence in this case. I hate to say this, your Honor, but I must.
>
> The Court: I can appreciate your being uneasy at this point, Mr. Robson, and I am not assisting anyone."

Again, at Tr., p. 3502 (1064):

> "Mr. Robson: If your Honor please, I ask that it be taken subject to connection against Mr. Duboff also.
>
> The Court: At this junction of the record, yes.
>
> Mr. Segal: And to Mr. Deutsch, your Honor.
>
> The Court: Mr. Deutsch is another story. For the moment I will cover all three of them with the subject to connection."

The Court also made many disparaging remarks relating to counsel's examination and objections to evidence:

> "Q. Did you become acquainted with the individuals who were connected with these funds? A. Yes.
>
> Q. Were these men well regarded in the financial community?
>
> Mr. Feffer: Objection, which men?
>
> The Court: The men running the funds, all of

them. Are they well regarded in the financial community?

Mr. Feffer: The reason I'm raising it, it depends upon the time. There were many different people who were involved here.

The Court: This answer is only as good as the question which was asked.

The Witness: The answer is yes.

The Court: Now you want to ask a question, Mr. Segal?

Mr. Segal: Certainly.

The Court: I think we ought to get to something with probative value.

Mr. Segal: Very well, your Honor." (Tr., p. 791) (309).

* * *

Q. And did he state anything to them which would indicate that they were to give you consideration and not prosecute you criminally?

Mr. Feffer: Objection, your Honor, Mr. Walker is available.

The Court: He is.

Mr. Segal: This witness is available for that conversation, your Honor.

The Court: Oh, really? (Tr., p. 1619) (510).

At Tr., p. 2057 (702):

"The Court: Can you tell us whether or not you were aware that there was a valuation committee at Financial Development or in one of the funds?

* * *

The Witness: I am aware there was such a committee.

The Court: It was called the valuation committee?

The Witness: Right.

Q. You say you are unaware that its composition was revised?

Mr. Feffer: Your Honor, I don't think there has been any testimony that it even existed and what it is.

The Court: He doesn't seem to be very much aware of it and I suggest you have to start with his being aware of its existence and composition before we get to the matter of revision. He doesn't seem to know much about it."

At Tr., p. 2316 (787):

Mr. Segal: Your Honor, I would ask for at least a ten minute adjournment.

"The Court: You shall have five, and we shall await your pleasure.

Mr. Segal: Your Honor, while the jury is waiting?

The Court: That's correct. We await your pleasure, sir.

Mr. Segal: Your Honor, I am asking for this adjournment because I just learned of this witness this morning, the Government—

Mr. Feffer: Objection—

The Court: Please, there will be no speeches. You know the Government has no obligation to provide you with the names of witnesses in this district prior to their taking the stand. You wish ten minutes, you shall have it."

See also Tr., pp. 1302; 1330; 1530; 2033; 2048; 3173 and 3330 (406, 409, 468, 690, 696, 977, 1030).

The Second Circuit has rightly forbidden even the appearance of partisanship by the Court which might prejudice the accused in the eyes of the jury. *United States* v. *Curcio*, 279 F. 2d 681 (2 Cir. 1960). As the Supreme Court stated in reversing conviction because the trial judge exceeded the bounds of fair comment:

> "[the district court judge's] privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference and may prove controlling.'" *Quercia* v. *United States*, 53 S. Ct. 598, 699, 289 U.S. 466, 77 L. Ed. 1321 (1933).

In this case, the Court's privilege of comment which necessarily carried great weight with the jury, was clearly abused.

The Court compounded its error by frequently interrupting witness' testimony with questions obviously designed to assist in presenting the witness' testimony in a light most favorable to the Government. During the Government's direct examination of Somer Jack Rothman, New Dimension's cashier, and an unindicted co-conspirator, the Court not only interrupted to assist the Government in formulating its question, but also went on to explicitly link a conversation between Rothman and Ryback with Deutsch:

> "The Court: You had a conversation with Ryback, you say?
>
> The Witness: Yes.
>
> The Court: That was after you met with Mr. Deutsch?" (Tr., p. 3490) (1060)

Other examples are:

Tr., p. 838, 39 (316-17):

> "Q. Is it also correct that never in any of those statements or in your testimony before the grand jury did you testify that Mr. Deutsch or Mr. Cohen gave you projections of $2.50 or $5 a share?
>
> Mr. Feffer: Your Honor, what statements are we talking about now?

Mr. Robson: We are talking about all the statements that were produced by the government.

The Court: Did anyone ever ask you, before you testified here in court, whether Mr. Cohen or Mr. Deutsch ever made any projections?

Mr. Block: I object.

Mr. Robson: That is not the question I asked.

The Court: I know it is not the question, Mr. Robson. A. No, they didn't.

The Court: Thank you.

Q. Were you asked—

The Court: Now you may ask your question.

Mr. Robson: My question, your Honor, was, was he asked about those conversations, and his testimony was that he was and I asked—

The Court: Let me hear that from the witness, Mr. Robson. Ask him the question.

Mr. Robson: I asked and he has already answered that.

My question is whether in any of those statements he ever stated to anybody in those conversations projections were given to him by either Mr. Deutsch or Mr. Cohen."

Tr., p. 1491-94 (460-63):

"Q. After the end of January, up to March 14th, which was when the first sale took effect of the underwriting of 10,000 shares, there were only 1,300-odd shares purchased by Kelly, Andrews & Bradley, is that not correct? A. About 1,000 shares.

Q. And those were purchased, were they not, at decreasing prices? A. In the month of February?

Q. In the month of February, and the beginning of March. A. No, sir, they were purchased at prices ranging from 35 to — 35 is the high purchase and 30 was the low purchase.

The Court: That's up from the low 20's, was it, the previous month?

The Witness: Yes, sir.

The Court: Thank you."

Tr., p. 1650 (530):

"Q. You stated that the use of proceeds must be set forth in the offering circular.

What is the purpose of including the use of proceeds in the offering circular? A. Well, this is one of the most important items in the offering circular, because this is what it is all about: The Company is trying to raise money for its business, whatever that purpose may be, and the investor should know exactly how the company intends to use the proceeds from the sale of the securities.

He has a right to know what the company is going to do with his dollar bill.

The Court: Indeed, he is investing in the company at that point.

The Witness: That's right."

Tr., pp. 1680-1681 (557-558):

Q. Talking from the standpoint of the investor, what if there is a failure to set forth all the material facts in the public offering?

Mr. Segal: Objection, your Honor. This witness is not an expert on individual investors. She values if anything, as an expert in the SEC area.

The Court: Let's find out what procedures are followed. She should know something about that, indicating, as she has, her background.

Let's find out what procedures are available, assuming for the moment that this situation described by Mr. Schatten is in fact the case. A. Well, the investor would be misled, because—

Mr. Robson: Objection, your Honor. That's the whole point, your Honor.

The Court: Please sit down, gentlemen. The investor could bring a civil suit, could he not?

The Witness: Yes, he could."

Tr., pp. 1689-90 (563-64):

"Q. In your opinion, Mrs. Appleton, if a broker-dealer acquires stock in a public offering from the issuer and places those shares in the broker-dealer's trading accounts and then the broker-dealer resells the shares, is that broker-dealer an underwriter with respect to that public offering?

* * *

The Witness: Yes.

Mr. Segal: I object further and ask that answer be stricken, because there are no number of shares designated in that hypothetical.

The Court: Fine.

Would the number of shares make a difference in the answer you just gave?

The Witness: Not in my opinion.

The Court: If he took one share or a thousand, would there be a difference?

The Witness: If it is all part and parcel of the public offering, he is a conduit in the distribution of the securities."

See also, Tr., p. 1263; 1269; 1320; 1326; 1480-81, 1592-94, 1646 (404; 405; 407; 408; 449-50; 497-98; 527).

In many cases, in an effort to "redress the balance between youth and experience", a trial judge will lean over backwards to assure that a jury will not equate the merits of either side's case with the degree of its skill of its advocate. *United States* v. *Guglielmini*, 384 F.2d 602 (2 Cir. 1967), *cert. den.* 400 U.S. 820 (1970). However, as this Court has recognized, such efforts are salutory only to the extent that they do not "cast the prosecutor in the

role of a young neophyte David contesting [illegible] practiced Goliath." *Id* at 605. The effect of [illegible] al intervention in the instant case was to create for the jury an unnecessary and prejudicial impression.

Both the Court's intervention on behalf of the Government and its abuse of its privilege of comment denied appellant a fair trial, on this ground alone, the conviction should be reversed.

POINT VI

The proof was insufficient for conviction of violation of Title 18, United States Code, § 1341.

Count Four of the Information, dealing with the substantive offense, charged the defendants with using the mails to transmit false ond misleading offering circulars and confirmations. That Court further alleged that William Harris and Harry Morginstin were the parties to whom the Offering Circulars were mailed. Appellant contends these mailings bore too remote a relation to the scheme to defraud as alleged to sustain conviction under the Mail Fraud Statute.

United States v. *Maze*, a recent Supreme Court case, 414 U.S. 395, 38 L.Ed. 2d 603 (1971), addressed itself precisely this question. Having found that the defendant, who had fraudulently obtained and used a credit card, thereafter "caused" invoices to be mailed to a Louisville bank, the Court then considered whether such mailings were "sufficently closely related to [the] scheme so as to bring his conduct within the statue", 38 L.Ed.2d at 608. While the mailings were held to be perhaps a reasonably foreseeable consequence of the act of unlawfully using a credit card, they were found, nonetheless, *not* in furtherance of the scheme to obtain money fraudulently.

The Court in *Maze* applied a stringent rule of statutory construction to the Mail Fraud Statute,* 38 L.Ed.2d at 611:

> "Congress could have drafted the mail fraud statue so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this, instead, it required that the use of the mails be 'for the purpose of executing such a scheme or article . . .' "

Following the Court's reasoning in *Maze*, it can hardly be said that the Offering Circulars mailed to Morginstin and Harris were for that purpose of fraudulently obtaining money or property. The utter absence of proof that either Morginstin or Harris even read the Offering Circulars indicates how tangential, if at all, a part the mailings played in the so-called scheme to defraud. Indeed, both Morginstin and Harris testified that because of their ignorance of the stock market, they had given Deutsch and DuBoff, respectively, complete discretion over their stock investments. (Tr., pp. 3384-85, 3472) (1043-44; 1049).

---

* The Federal Mail Fraud Statute, 18 USC § 1341, reads:

> "Whoever, having devised or intending to devise any scheme, or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000. or imprisoned not more than five years, or both."

The Goverment in its proof alleged that Morginstin and Harris were in fact nominees of the defendants Deutsch and DuBoff respectively, and that their brokerage accounts were under the control of these same defendants.

Appellant Deutsch was also charged with violations of 18 U.S.C. §1341 in that brokerage confimation slips were mailed from KAB to Morginstin, Harris, Richard Packing, FVF, and FDF. It is understood that the Second Circuit has in the past upheld convictions under the Mail Fraud statute based upon mere mailings of confimation slips, *United States* v. *Marando*, Docket Nos. 73-2378, 73-2433, 73-2455, 73-2545 (July 3, 1974). The Supreme Court has granted a writ of *certiorari* to consider the the precise question, *Berardelli* v. *United States*, Docket No. 74-5059, filed August 2, 1974, see CCH Fed.Sec.L.Rep., August 21, 1974, on appeal from the Second Circuit's decision, *United States* v. *Marando*, *supra*. In light of this pending clarification and the fact that the presant case may be factually distinguished from the *Marando* case, *supra*, appellant respectfully urges that the confimation slips here involved were not "for the purpose" of executing a scheme to defraud.

The slips in the *Marando* case enabled the co-conspirators fraudulently to obtain a bank loan. In contrast, the "scheme" to obtain money in the instant case had "reached fruition" at a point before the confirmation slips were mailed out, see *Kann* v. *United States*, 323 U.S. 88, 94, 65 S. Ct. 148, 89 L.Ed. 88 (1944). The confirmation slips here at issue did not significantly assist the defendants in obtaining money, c.f. *Pereira* v. *United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954). Nor can it be said that the slips lulled the customers into a false sense of security; cf. *United States* v. *Sampson*, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed. 2d 136 (1962), where a letter assuring the victims that the services for which they had contracted would be performed constituted mail fraud because this was "a de-

liberate, planned use of the mails after the victims' money had been obtained", 371 U.S. at 80. It would appear that the test for mail fraud is affirmative, fraudulent use of the mails, not just an incidental mailing which normally accompanies a transaction but does not serve to further it. The Court's rationale in the *Sampson* case, *supra*, did not embrace the mailing of routine receipts where buy or sell orders were simply recorded.*

CONCLUSION

Appellant hereby incorporates the arguments of counsel for the remaining appellants to this case and requests that the points and authorities raised in the briefs of the other appellants be considered on behalf of appellant Deutsch.

For the reasons stated in this brief and those in the briefs of the remaining appellants, it is respectfully requested that the convictions be reversed and the case dismissed.

Respectfully submitted,

SEGAL & HUNDLEY
Attorneys for Defendant-
Appellant Bernard Deutsch
745 Fifth Avenue
New York, New York 10022

Dated: October, 1974

* Notwithstanding the foregoing, the Court in *United States* v. *Marando*, *supra*, found that brokers' confirmations served to postpone the customers' ultimate complaints to the authorities. Indeed, it could be construed that this was only one facet of that court's holding; for even if the confirmations conferred the appearance of legitimacy, they functioned as well to provide a written record and increase the probability that impropriety connected with the transactions would be detected, see *United States* v. *Maze*, *supra*, 38 L.Ed.2d at 610.

SERVICE OF THREE (3) COPIES OF THE WITHIN

IS HEREBY ADMITTED

THIS 31 DAY OF Dec 1974

COPY RECEIVED
PAUL J. CURRAN
DEC 31 1974
U. S. ATTORNEY
SO. DIST. OF N.Y.

Attorney(s) for